Supreme Court, U.S.
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No. 00-____

IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN H. TANKLEFF,

Petitioner,

v.

SUPERINTENDENT OF CLINTON CORRECTIONAL FACILITY,
COMMISSIONER OF NEW YORK STATE DEPARTMENT
OF CORRECTIONAL SERVICES, AND
ATTORNEY GENERAL OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

STEPHEN L. BRAGA *
SCOTT L. NELSON
JENNIFER M. O'CONNOR
MILLER, CASSIDY,
LARROCA & LEWIN, LLP
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

* Counsel of Record

84pp

QUESTION PRESENTED

The question presented in this case is one for which the United States Court of Appeals for the First Circuit has requested "more guidance from the Supreme Court." It is:

> Whether *Oregon v. Elstad*, 470 U.S. 298 (1985), forecloses any use of the "fruits of the poisonous tree" doctrine in cases where there is a blatant violation of an individual's constitutional right to *Miranda* warnings but the circumstances of the unwarned interrogation do not satisfy the constitutional standard for an involuntary confession.

LIST OF PARTIES

The parties to the proceeding below were:

Martin Tankleff, Petitioner-Appellant;

The Superintendent of Clinton Correctional Facility, Respondent-Appellee;

The Commissioner, New York State Department of Correctional Services, Respondent-Appellee; and

The Attorney General of the State of New York, Respondent-Appellee.

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Petitioner Martin H. Tankleff ("Marty") respectfully requests that this Court issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 7, 2000. The issue on which review is sought was decided by the Second Circuit at an earlier stage in the case in a decision issued on January 12, 1998.

OPINIONS BELOW

On April 7, 2000, the Second Circuit issued the unreported judgment (Appendix "App." 1a-2a) from which this petition is brought. The order of the Second Circuit denying rehearing of that judgment (App. 47a–48a) is unreported. The earlier decision of the Second Circuit ("App." 3a–36a) that addresses the Question Presented is reported at 135 F.3d 235 (1998). A relevant opinion (App. 37a–46a) addressing the *Miranda* issue was issued by the Appellate Division of the Supreme Court of New York on December 27, 1993, and is reported at 606 N.Y.S.2d 707 (1993).

JURISDICTION

The final judgment of the Second Circuit denying petitioner's request for a certificate of appealability was issued on April 7, 2000. A timely petition for rehearing of that decision was denied on May 30, 2000. *See* App. 37a–46a. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review denials of requests for certificates of appealability. *See Hohn v. United States*, 524 U.S. 236 (1998). This petition is timely under Supreme Court Rule 13.3. This Court has jurisdiction to consider questions raised and decided in earlier stages of the case on petitions to review a final judgment in the same case. *See Mercer v. Theriot*, 377 U.S. 152, 153–54 (1964); Stern, Gressman & Shapiro, *Supreme Court Practice*, pp. 41–42 (6th Ed. 1986).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . .."

STATEMENT OF THE CASE

This petition presents an important question of constitutional and federal criminal law that requires resolution by this Court, particularly in light of this Court's decision last Term in *Dickerson v. United States*, 120 S. Ct. 2326 (2000). The question presented is whether, as the Second Circuit held, this Court's decision in *Oregon v. Elstad*, 470 U.S. 298 (1985), absolutely forecloses inquiry into whether the fruits of interrogation after belated *Miranda* warnings are tainted by prior unconstitutional interrogation in violation of *Miranda*. The federal courts of appeals are in open disagreement on this question.

1. Factual Background

This is the final stage of an attempt to secure federal *habeas corpus* relief for young Marty Tankleff, who has been languishing in prison for ten years as a result of an unbelievable course of proceedings through the New York state judicial system. In one of the most highly publicized murder cases in the history of that state, then–teenage Marty was found guilty of killing his parents, after a trial in which there was a striking absence of physical evidence connecting him to that crime. What there was, instead, was a "confession" that Suffolk County police detectives wrought from Marty after hours of interrogation in blatant violation of his *Miranda* rights.

a. Marty Discovers His Parents' Bodies

On September 7, 1988, on what was supposed to have been the first day of his senior year of high school in

suburban Long Island, Marty, who had just turned 17, awoke around six a.m. Seeing lights on in his father's study, where three hours earlier his father had hosted a poker game, Marty entered the study. There, he discovered his father bloodied and unconscious, the victim of a vicious stabbing. Seymour Tankleff was wearing the same clothes he had on at the poker game the evening before. Other participants in the poker game said it had broken up around 3:00 a.m. J.A. 1981.[1] The last poker player to leave the Tankleff house was Seymour's business partner, Jerry Steuerman. J.A. 1987–90.

Marty immediately called "911." The call was logged in at 6:11 a.m. J.A. 1892–95. As he awaited the arrival of the ambulance and the police, he attempted to render first aid to his father in accordance with the "911" operator's instructions, by using a pillow to elevate his father's legs and wrapping a towel around his gaping neck wound. J.A. 29–37; 1895–96. He then explored the remainder of his home and found the body of his mother, Arlene Tankleff. She had been fatally attacked in a similarly brutal manner. J.A. 2347–48.

b. The Police Immediately Suspect Marty

When the police arrived at the scene, they almost immediately focused their suspicion on Marty. Ten days earlier, Marty had undergone nose surgery. As a result, his face was discolored and his eyes reddened. J.A. 25; 2345. In short, he looked as if he had just been in a fight. Moreover, Marty immediately volunteered to the officers that he believed his father's business partner, Jerry Steuerman, committed the crime. Marty's emphatic allegations of the bases for suspecting Steuerman apparently served only to reinforce the officers' suspicion of Marty himself.

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[1] Pertinent portions of the state court record were included in the joint appendix on appeal, which is cited herein as "J.A."

Within minutes of the police's arrival at the scene, Officer Aki instructed Marty and Ronald Rother, Marty's brother–in–law, to leave the house and not speak to each other. J.A. 1922–24; 2349–50. Aki said he did not want them to "contaminate each other's story." *Id.*; J.A. 41–54; 1923–24. At approximately 6:37 a.m., Aki led Marty to his police car and placed him in the front seat. Marty asked Aki whether he could return to the house to wash off his father's blood, which had gotten on him when he attempted to render first aid to his father. J.A. 1926. Aki denied Marty's request, telling him he could not re–enter the house because it was now a crime scene. J.A. 1927.

At 7:39 a.m., Detective McCready arrived at the scene. J.A. 127; 2236. He walked through the house, surveying the crime scene, and then came outside and introduced himself to Marty. He asked Marty to wait for him in his police car. McCready began questioning Marty at approximately 7:55 a.m. J.A. 2241.

c. Marty Is Repeatedly Interrogated At Length

McCready asked Marty what he had done the evening before and what had happened that morning. Marty described going to the shopping mall with several friends the evening before. J.A. 136–37; 2242–43. After he returned home, he ate dinner, showered and went to bed. J.A. 136–37; 2243–44. Marty said that he set his alarm for 5:35 a.m. and arose at 6:10 a.m. He noticed that lights were on in the house. He looked in his parents' bedroom, in which there were no lights on, and did not see anyone. J.A. 138–39; 2244–45. He then went to his father's office, where he found his father in a chair at his desk, gravely injured. He immediately called "911." J.A. 139; 2246. After calling "911," he went and got a pillow and a clean towel. He placed his father on the floor, elevated his feet and placed the towel on his neck wound. J.A. 139–42; 2246. Marty then went through the house looking for his mother. When he went back to his parents'

bedroom, he saw his mother's body on the floor next to the bed. He telephoned his half–sister, Shari Rother, to tell her what had happened. J.A. 144–45; 2247. Marty told McCready that he believed that Steuerman was responsible because Steuerman and his father had been fighting about money. J.A. 134–35; 2241–42.

Following his interrogation of Marty, McCready went back into the Tankleff residence and further examined the crime scene. J.A. 2249. At about 8:10 a.m., Detective Sergeant Doyle arrived on the scene and briefly inspected the house. J.A. 153; 410–12; 2151–53; 2253–54. McCready introduced Doyle to Marty and asked Marty to explain to Doyle what he had done the previous evening and that morning. J.A. 2254. Thus, for the second time that morning, Marty relayed those events to a police officer.

At 8:15 a.m., Detective Rein arrived. J.A. 2162. Rein joined Marty and Doyle at McCready's car. Marty was asked to repeat his story for a third time, for Rein's benefit. J.A. 919; 2163–69. Marty stayed at the car while Rein met with McCready and Doyle. J.A. 2169 and 1126.

Based on what the officers believed to be inconsistencies in Marty's repeated telling of the events of that morning and the prior evening, they decided to ask him to accompany them to the police station for further questioning. J.A. 914; 927–29. The "inconsistencies" consisted of the following: Marty did not appear to have blood on his clothes, J.A. 913a; one retelling of his story had him awakening six minutes earlier than another retelling, J.A. 914; there was a discrepancy between the times he said he had showered the evening before; and he said he could not see his mother when he first looked in the master bedroom, while the detectives could easily see her body when looking into the room from the doorway. J.A. 914–15; 928–29; 1126–27; 1131; 1138–

39.[2] By this time, approximately 8:35 a.m., McCready and Rein concede that they considered Marty to be a suspect. J.A. 162; 383–87; 1132; 2210; 2288; 2373.

d. The Police Take Marty To The Station

McCready "requested" that Marty accompany him to police headquarters so McCready could obtain further background information, purportedly about his father's business relationship with Steuerman. J.A. 162–64; 387; 2255; 2287–87. McCready did not inform Marty that he was not required to go with him. J.A. 2255; 2286–87.

When Marty's surviving family members later became alarmed that Marty had not yet appeared at the hospital, they asked an officer at the hospital to locate Marty. The officer reached McCready by pager and reported back to the family members that Marty was going to police headquarters to tell the police about his father's relationship with Steuerman and would be taken to the hospital when the police were finished. J.A. 164–65; 1512; 1522; 1581–85; 1596–99. In fact, the detectives always planned to question Marty about the attacks, not about Steuerman. J.A. 2159–60.

The police took Marty from the scene, barefoot and wearing only shorts and a sweatshirt, by police car. J.A. 40. Marty still had his father's blood on him from his first aid attempt. Alone in the police car en route to the station, McCready further questioned Marty about his discovery of his mother's body, the "911" call and Jerry Steuerman.

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[2] Marty initially looked into the room before 6:11 a.m., when he called "911." Sunrise that morning did not occur until 6:25 a.m. J.A. 2279. Obviously, it was much brighter in the room when the detectives arrived than it had been when Marty initially looked into it.

e. Increasingly Hostile Questioning Continues At The Station

At the police station, Marty was questioned further — this time by Detectives Rein and McCready. Starting at 9:40 a.m., the questioning proceeded without interruption for more than two hours.[3] J.A. at 1005–06; 2256–57. The interrogation took place in a ten–by–ten windowless room with the door closed. McCready, who was approximately six feet tall and weighed 225 pounds, sat at the desk, with Marty in front of him. Rein, who was six foot two and weighed about 190 pounds, sat next to Marty, who was five feet eight inches tall and tipped the scales at 150 pounds. J.A. 2170–71; 2257–58.

While the detectives began the interrogation with small talk, they rapidly became hostile and accusatory. J.A. 2356. McCready commented on the fact that he had not seen Marty shed a single tear over the attack. When Marty noted that he had cried before the police arrived, Rein commented that such a short period of grief was improper. J.A. 204–05; 1231–32; 2173–74 and 2259.

Obviously displeased with Marty's rendition of the events, the detectives had Marty go over yet again the events that he had already described three times to three different detectives at the crime scene. But this time, the detectives challenged his statements. They challenged the time that he said he got up and got dressed that morning. J.A. 2262–63. They challenged his inability to see his mother when he initially looked into his parents' bedroom. J.A. 2263–64. They challenged why there was no blood on his clothes if he had attempted to render first aid to his father. J.A. 2264.

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[3] Although the detectives had recording devices available, and the ability to record surreptitiously, they deliberately chose not to record Marty's interrogation. J.A. 559; 565–66.

Shortly after 11:00 a.m., Marty was asked to demonstrate how he had attempted to render first aid to his father. J.A. 205; 948–49; 2174–77 and 2259–61. As Marty was demonstrating, with Rein playing the role of Seymour Tankleff, McCready noticed a spot of blood on Marty's shoulder. J.A. 214; 2176 and 2261. McCready pulled aside Marty's sweatshirt and pointed to the blood. J.A. 214; 950–51; 1232–33; 2176 and 2261. Both McCready and Rein expressed disbelief that Marty could have rendered assistance as he described without getting blood on his shorts or sweatshirt. J.A. 2264. McCready told Marty his story was "ridiculous." J.A. 1251; 2178–79 and 2265. Rein termed it "absurd" and "unbelievable" and told Marty that he did not believe him. J.A. 1251–52; 2178 and 2265.

f. Detective McCready's Hoax Induces A "Confession"

Ultimately, at approximately 11:45 a.m., McCready left the room purporting to be on the telephone. J.A. 233–36; 961; 2184–85 and 2266–67. While McCready was out of the room on the telephone, Rein placed both hands on Marty's knees and told Marty that he "couldn't accept" Marty's explanations for the lack of blood on his clothing. J.A. 1287–90; 2185 and 2211. When McCready returned, he falsely reported that he had been on the phone with the hospital and that Marty's father had come out of his coma and positively identified Marty as his attacker.[4] J.A. 235–36; 729; 1291–93;

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[4] McCready conceded that, as an interrogation technique, he wholly fabricated this telephone conversation that he told Marty about. J.A. 731–32. Marty testified that this was not the only time during the interrogation that McCready or Rein relied on such deceptive techniques. Prior to McCready's ersatz telephone conversation, the detective had told Marty that he was lying about having taken a shower the evening before, but not having taken one that morning. The detectives told him they knew he was lying because they had performed a "humidity test." J.A. 2357. Additionally, the detectives told Marty that hairs were found in Arlene

2186; 2267; 2289–90. As McCready relayed this information to Marty, he leaned over and pointed at him. J.A. 727–28.

Yet, even faced with the devastating information that his father was saying that he was the one who had attacked his father and murdered his mother, Marty maintained his innocence, even offering to submit to a lie detector test. J.A. 237; 962; 1300; 2291. The detectives refused to administer such a test, however, and continued to seek a confession from Marty based on his father's purported identification of him as the attacker. J.A. 237; 962; 1300; 2186 and 2268. Rein, dropping the last veneer of subtlety masking the detectives' accusations, asked Marty if his father was conscious when Marty "beat and stabbed" him. J.A. 2186. Marty still had been given no *Miranda* warnings, despite the fact that the detectives were now explicitly accusing him of murder and claiming his own father was an eyewitness.

Marty then asked if it were possible that he had attacked his parents, but had "blacked out" and had no memory of it. J.A. 238–39; 737; 962; 1300–01; 2123–24; 2268–69; 2359. The detectives prodded him further and encouraged this line of thinking. Soon, Marty indicated that "[i]t's starting to come to me." J.A. 238–39; 963; 1302–03; 2186–87 and 2268–69. Only then, at 11:54 a.m., did the detectives for the first time provide *Miranda* warnings. J.A. 240; 745–46; 814; 963; 1305–06; 2187–88; and 2269.

With no break whatsoever in the interrogation, the detectives then elicited a tale from Marty about how he supposedly had killed his mother and attacked his father. As Marty recounted it, assisted by the detectives' provision of

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Tankleff's hand, which they had identified as being Marty's hair. J.A. 2356. In fact, the hair found in Arlene Tankleff's hand had not yet been scientifically examined. When it was, the government's forensics evidence concluded that the hair did *not* match Marty's hair, although it was consistent with hair from a hair weave – such as the one worn by Jerry Steuerman. J.A. 1436–37; 2082–87.

information they had gleaned from the crime scene, he awoke and went into his parents' bedroom, naked, with a dumbbell from a set of weights in his room. Only his mother was in the room. He hit her on the head repeatedly with the dumbbell. J.A. 2195 and 2275. Realizing she was not dead, he went to the kitchen and took a knife that the detectives had observed on the counter and returned to the bedroom and stabbed his mother. J.A. 2195 and 2275. He next went through the length of the house and found his father in the study where he had been playing poker the evening before. He proceeded to beat and stab his father. J.A. 2195–96; 2275. He then went to the bathroom by his bedroom, showered, washed off the knife and dumbbell, returned them to their respective locations and called "911," purporting to have just found his wounded father. J.A. 2196–97 and 2276–77.

The continuous interrogation finally ceased at 1:22 p.m., when an attorney representing Marty at the behest of his remaining family members telephoned the police station and insisted that no further questioning of Marty occur. J.A. 2198–99; 2224–25; and 2278.

g. The "Confession" Is Not Supported By The Evidence

Later that afternoon, Marty spoke to his half–sister, Shari Rother. In that conversation, Shari testified that Marty told her that he had confessed because "they made me." J.A. 1435. Marty has consistently and adamantly maintained his innocence from the time his "confession" was extracted from him to this day.

Significantly, none of the Government's forensic testing corroborated Marty's detective–led story. Despite a three–day search of the crime scene, both inside the Tankleff residence and on its grounds, involving teams from Homicide, the Crime Laboratory, the Identification Section, the K–9 Unit and the Crime Scene Unit, no solid evidence

was unearthed to corroborate Marty's "confession." J.A. 2039–40. All knives in the kitchen (and those found elsewhere in the house) and the dumbbells in Marty's room were disassembled and tested for the presence of even the most minute quantity of blood or human tissue. Each tested negative. J.A. 2114; 2129–30.[5]

While Marty "confessed" to using a dumbbell, the physician who treated Seymour upon his arrival at the hospital, Dr. Tyson, testified that he believed that the wounds were most likely inflicted by a hammer. J.A. 2365–66. The forensic pathologist who testified at trial also conceded that the wounds were consistent with having been inflicted by a hammer. No hammer with any traces of blood was ever found on the grounds of the Tankleff residence.

Marty's shower was searched exhaustively for blood, human tissue, or hairs or fibers belonging to his parents. Even the trap from the shower drain was removed and analyzed. All tests proved negative. J.A. 2136–37. The towels in his bathroom exhibited no signs of blood. J.A. 2137–39. No drops of blood were found on the floor between the parents' bedroom, the study or Marty's bathroom. J.A. 2046–47; 2049–50; 2051–52.

No blood positively identified as belonging to Marty was found in either room where the bodies were located, despite Government forensics testimony that at least Arlene Tankleff put up a struggle. Likewise, no hair or fiber evidence from Marty was found in either room. J.A. 2053–57; 2058–78; 2087 and 2095. While Marty was recovering at the time from nose surgery that had resulted in some bleeding, the police observed no cuts or other evidence of a struggle on Marty. Scrapings of his fingernails produced no evidence of a

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[5] The tests were "sensitive to the point of being able to detect blood diluted from one part in a thousand to one part in ten thousand." J.A. 2126.

struggle. J.A. 2194. Scrapings of Arlene's fingernails produced no sign of Marty's skin.

Contrary to Marty's "confession" that he murdered Arlene and then murdered Seymour, Seymour's blood was found in the master bedroom where Arlene's body was found. A blood stain on the fitted sheets on the bed was consistent with Seymour's blood, and inconsistent with Arlene's or Marty's blood, as was a blood stain found on the wall of the master bedroom. J.A. 2105–06. Glove prints were found in the parents' bedroom and by the light switch in Marty's bedroom. J.A. 2147–50. No gloves were mentioned in Marty's story, and none was ever found to match the bloody prints found in the house. J.A. 2148–49.

h. The Police Fail To Investigate The Prime Suspect

Surprisingly, the Suffolk County detectives never truly pursued any other leads or suspects in their investigation of the Tankleff murders. While Jerry Steuerman had been identified as a potential suspect on the very morning the bodies were discovered, the police never considered him a suspect and never truly investigated his potential involvement. The police ignored Steuerman as a possible suspect even though each of the other participants at the poker game the evening before the murders stated that the game broke up around 3:00 a.m., three hours before Marty discovered his parents' bodies, and that they each left the Tankleff home before Steuerman did. J.A. 1986–90.[6] Poker

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[6] Evidence at trial corroborated the theory that Marty's parents were killed at about this time. Ethel Curley, the emergency technician who responded to the "911" call and was the first of the medical personnel to examine Arlene, testified that the blood on Arlene's head, forearm and nightgown was dry. J.A. 1929–30. Likewise, a technician assisting Seymour described a large golf ball size clump of blood falling from Seymour's body that was so coagulated that it made a loud noise when it hit the floor. J.A. 1936–37. The dried blood present on both bodies

player Joseph Cecere testified that when he left, Steuerman, who moments before had been engaged in a serious and private conversation with Seymour Tankleff, waved him ahead even though Steuerman's car was parked behind his. J.A. 1987–90.

One week after the attacks, Steuerman engaged in behavior so bizarre that — in and of itself — it should have raised serious suspicions about his involvement in the attacks. After withdrawing money from his and Seymour Tankleff's joint bank account, Steuerman *feigned his own death and disappeared.* J.A. 2024–25; 2021–23. Steuerman was subsequently found in California, having shaved his beard, changed his hair weave and begun living under an alias. J.A. 2026–27. However, such classic consciousness of guilt evidence was wholly ignored by the Suffolk County detectives.

At the time that the Tankleffs were attacked, Steuerman owed Seymour Tankleff a substantial sum of money. He had been paying his debt through weekly cash payments, brought to the poker games, but was, at the time of the murders, experiencing serious financial difficulties that were affecting his ability to pay his debts. J.A. 1993–97; 2003–15.[7] Throughout the months preceding the attacks, his relationship with Seymour had deteriorated, and they had had numerous arguments over their respective business ventures. For example, Steuerman had wanted to enter into a new

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suggested a time of death inconsistent with Marty's "confession" that he killed his parents just before calling "911." Rather, it suggests a time of death hours earlier, when Steuerman was at the Tankleff home.

[7] Mike McClure, an attorney in California, testified that Seymour had told him that summer that Steuerman had recently attempted to get out from under his weekly obligation to make payments to Seymour at the weekly poker games. Seymour had pointedly told Steuerman not to "fuck with" him. J.A. 2377. After Seymour's death, Steuerman stopped making the payments to his estate. J.A. 1993; 2001; 2016; 2017.

business with his son, but Seymour insisted that he could only do so with Seymour's participation. J.A. 1990–2000. As Steuerman testified, Seymour seemed to think that he not only owned half of the partnership, but half of Steuerman. J.A. 2018.

Steuerman's only alibi was provided by his daughter, who testified that he returned at precisely 3:17 a.m. from the poker game the morning of the attacks. J.A. 1992. However, the Government's forensics experts identified hairs on Arlene Tankleff's body, particularly in her hand, that were rootless and did not match Marty's hair. J.A. 2069–70; 2982; 2983–87. Likewise, rootless hair was found on Seymour Tankleff's person that was *inconsistent* with Marty's hair. J.A. 2088. Steuerman had a hair weave, made of rootless hair. J.A. 2092; 2094.

i. Suffolk County Closes The Case With Marty's"Confession"

The Suffolk County detectives quickly closed the book on the Tankleff murder investigation with Marty's "confession." It was either police work at its best or at its worst, although subsequent developments reinforce only the latter conclusion. Just seven months after Marty was grilled and deceived by Suffolk County detectives, the State of New York Commission of Investigation released an extensive report detailing the findings of its own investigation of the Suffolk County Police Department. *Report of the Temporary Commission of Investigation of the State of New York* (April 1989) ("SIC Report"); J.A. 1644–1846. That report found "that, in contrast to other large suburban counties, the Suffolk County Police Homicide Division obtained and relied upon confessions and admissions in *94%* of homicide cases prosecuted." *Quartararo v. Mantello*, 715 F. Supp.

449, 466 (E.D.N.Y. 1989) (emphasis added).[8] The Commission concluded that this was "an astonishingly high figure compared to other jurisdictions, so high, in fact, that in and of itself it provokes skepticism regarding Suffolk County's use of confessions and oral admissions." SIC Report at 55; J.A. 1699.

2. Prior Judicial Proceedings

Based on the handiwork of the Suffolk County detectives, Marty was indicted for the murder of his parents. During the course of lengthy pretrial proceedings, Marty moved to suppress the statements he gave to the detectives on the ground, *inter alia*, that the detectives violated his *Miranda* rights in obtaining the statements. The trial judge denied that motion. He ruled that Marty was not in custody for purposes of *Miranda* until the very moment that the detectives decided to give *Miranda* warnings to him and, accordingly, that his "confession" was admissible.

A close and bitterly fought trial ensued. After lengthy trial proceedings, the jury acquitted Marty of intentionally murdering his mother, but found him guilty of killing his mother with depraved indifference to human life and intentionally killing his father. The jury deliberated for a full week before reaching these verdicts, and one juror later even tried to recant his guilty verdict. As a result of the convictions, Marty was sentenced to serve fifty years to life in prison. He is now serving that sentence.

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[8] By way of contrast, the report noted that the six other similar jurisdictions studied had confession rates varying between 54% and 73%. *See id.*

a. Two Members Of Appellate Panel Vote To Reverse

On December 27, 1993, a sharply divided panel of the state Appellate Division affirmed Marty's convictions by a vote of 3–2. *See* 606 N.Y.S.2d 707 (1993); App. 37a–46a. The majority held that Marty was not entitled to *Miranda* warnings earlier than he received them because he was not in custody before that point in time. The dissenters found that the confession was obtained in violation of *Miranda*. Even assuming *arguendo* that Marty was not in custody from the moment he first arrived at the station house, the dissenters "concluded that once Detective McCready falsely advised the teenaged defendant that his father had identified him as the assailant, no reasonable, innocent person who found himself identified as the perpetrator in this manner would have believed that he was free to leave." App. at 44a. Moreover, in the dissenters' opinion, "[i]n view of the absence of any other evidence connecting the defendant to the murders, except for the confession which he disavowed at the trial, the indictments should be dismissed" as well. App. at 45a-46a.

b. State High Court Affirms With Little Analysis

The New York Court of Appeals affirmed the divided Appellate Division in a perfunctory one–page opinion. 622 N.Y.S.2d 503 (1994). On the *Miranda* issue, the Court of Appeals concluded: "in view of our limited power to review mixed questions of law and fact, there is no basis for us to overturn the lower court's decision not to suppress the defendant's confession." J.A. 3763.

c. District Court Denies the Habeas Petition

Marty sought collateral review of his state court convictions in the United States District Court for the Eastern District of New York, pursuant to 28 U.S.C. § 2254. The petition was assigned to United States District Judge Thomas

C. Platt. Without holding a single hearing or even oral argument in the case, Judge Platt denied Marty's petition in its entirety. J.A. at 3765–86.

d. The Second Circuit Reverses, In Part

The Second Circuit affirmed in part and reversed in part Judge Platt's denial of Marty's *habeas* petition. With regard to the *Miranda* claim, the Second Circuit found that "[t]he police interrogated Tankleff on and off from 6:17 to 11:54 a.m. without giving him *Miranda* warnings." App. at 12a. The court then ruled:

> Based on the totality of the circumstances, we believe that Tankleff was in custody and hold that he was entitled to the *Miranda* warnings at some point prior to 11:54 a.m., when he was finally advised of his rights. For the last two hours, he had been subjected to increasingly hostile questioning at the police station, during which the detectives had accused him of showing insufficient grief, had said that his story was 'ridiculous' and 'absurd,' and had added that they simply 'could not accept' his explanations. Finally, at 11:45 a.m., they told him that his father had woken up from a coma and accused him of the attack. If not before, then certainly by this point in the interrogation no reasonable person in Tankleff's position would have felt free to leave. Tankleff should, therefore, have been advised of his rights as required by *Miranda* much earlier than he was, and all of the inculpatory statements he made before receiving the warnings should have been suppressed.

App. at 14a.

Turning to the issue of whether the post–warning statements would be suppressed, the panel did not conduct a "fruits of the poisonous tree" analysis based on the *Miranda* violation it had found. Instead, stating that it was following the requirements of *Oregon v. Elstad*, 470 U.S. 298 (1985), it examined whether Marty's first confession was constitutionally involuntary, using the "totality of the circumstances" test for the voluntariness of a confession. App. at 15a–16a. The court of appeals concluded:

> The issue is a close one. But, based on all the circumstances, we conclude that, under *Elstad*, the interrogation that took place before the reading of the *Miranda* warnings *barely did not entail that degree of coercion* that would irredeemably taint Tankleff's "second," *Mirandized* confession.

App. at 17a (emphasis added). With this analysis, the Second Circuit made plain its position that under *Elstad*, a "fruits" analysis is not applicable if the initial, pre–warning confession was not constitutionally involuntary. It underscored this position by explaining that New York State courts have not adopted the *Elstad* rule, and instead apply the "fruits" doctrine to *Miranda* violations. App. at 17a-18a.[9]

Elsewhere in the opinion, the Second Circuit reversed Judge Platt's ruling that Marty had failed to establish a *prima facie Batson* claim with regard to the jury selection at his

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[9] Ironically, given the Second Circuit's ruling on the custody issue, New York state law would entitle Marty to relief given New York's rejection of *Elstad*. However, for purposes of application of New York law, the New York courts do not consider themselves bound by the Second Circuit's federal-law holding that Marty was in custody, even though the applicable legal standards are identical. *See*, *People v. Tankleff*, order denying motion No. 1022 (N.Y. Sept. 14, 1999) (denying motion for rehearing in light of Second Circuit decision that Tankleff *was* in custody).

trial, *see* App. at 24a, and remanded the case for further proceedings on that issue, which have now been completed. On remand, the district court denied relief on the *Batson* issues, and the Second Circuit denied a certificate of appealability from that ruling on April 7, 2000. App. 1a–2a. With the final appellate resolution of Marty's habeas petition, a petition for certiorari challenging the Second Circuit' *Elstad* holding is now ripe for review. *See Theriot, supra.*

REASONS FOR GRANTING THE WRIT

Self-interested petitioners come before this Court in droves suggesting Circuit splits that require prompt resolution. On the issue presented here, not only the petitioner, but a panel of Circuit Judges has requested resolution of a circuit split. Two years ago, Circuit Judges Boudin, Coffin and Cyr of the First Circuit expressly requested "more guidance from the Supreme Court" on the *Elstad* issue raised by this petition, in light of the conflicting approaches the courts of appeals have taken to it. *United States v. Byram*, 145 F.3d 405, 409 (1st Cir. 1998). The need for "guidance" suggested by those esteemed jurists has been heightened by this Court's recent decision in *Dickerson v. United States*, 120 S. Ct. 2326 (2000), which — as dissenting Justices Scalia and Thomas noted — calls into question the analytical underpinning for much of the *Elstad* jurisprudence.

I.

THERE IS A DEEP SPLIT IN THE CIRCUITS OVER THE BREADTH OF "FRUITS" ANALYSIS AFTER *ELSTAD*

In *Oregon v. Elstad, supra*, this Court ruled that the *Miranda* "presumption" that unwarned statements were compelled "does not *require* that the statements and their fruits be discarded as inherently tainted." 470 U.S. at 307 (emphasis added). The Court went on to find no "taint" on

the facts of that case, which were not particularly troubling.[10] The defendant in *Elstad* had made an incriminating statement while being interrogated at his home, without any "earmarks" of coercion and without *Miranda* warnings. *Id.* at 301–02, 315, 316. Thereafter, a clear break in the interrogation followed, while the defendant was taken to the police station, where he was then read *Miranda* warnings and questioned a second time. *Id.* at 301–02, 315. He then made a full confession, which the Court found not to be "tainted fruit" of the prior *Miranda* violation and, hence, admissible against him. *Id.* at 317–18.

Dissenting in *Elstad*, Justice Stevens emphasized what he believed to be the limits of the majority's holding, and its potential consequences:

> I am persuaded that the Court intends its holding to apply only to a narrow category of cases in which the initial questioning of the suspect was made in a totally uncoercive setting and in which the first confession obviously had no influence on the second. I nevertheless dissent because even such a narrowly confined exception is inconsistent with the Court's prior cases, [and] because *the attempt to identify its boundaries in future cases will breed confusion and uncertainty in the administration of criminal justice*.

Id. at 364–65 (emphasis added). That "confusion and uncertainty" have now come home to roost. Not only have most of the Circuit Courts of Appeals applied the *Elstad* holding to a much broader category of cases than those that Justice Stevens believed the *Elstad* majority intended to reach, they have done it in strikingly inconsistent ways,

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[10] As the Second Circuit wrote in *Tankleff*, "In this respect, *Elstad* was a relatively easy case." App. 15a, n.2.

leading to radically different results for defendants, depending on the Circuit in which they bring their appeals.

For example, the Eighth Circuit has adopted the view that after *Elstad*, a "fruits" analysis of a *Miranda* violation is permissible in some circumstances, even where the initial confession was constitutionally voluntary. *See United States v. Carter*, 884 F.2d 368 (1989). In *Carter*, after nearly an hour of questioning, the defendant made incriminating statements, after which he was warned of his *Miranda* rights. He then waived those rights and wrote out a confession. *See id.* at 369. The court rejected the government's argument that even if the unwarned statement had to be suppressed, the warned statement was admissible. *See id.* at 372. The court assumed the first unwarned confession was voluntary, *see id.* at 373, but nonetheless applied a "fruits" analysis to the second confession, determining that there was "no passage of time" between the first confession, the warnings and the second confession, "all of which occurred as part and parcel of a continuous process." *Id.* The court ultimately refused to read *Elstad* as forbidding a "fruits" analysis of all *Miranda* violations, stating "[w]e think *Elstad* did not go so far as to fashion a rule permitting this sort of end run around *Miranda*." *Id.*

Recently, in *United States v. Byram*, *supra*, the First Circuit adopted a view similar to the Eighth Circuit's, interpreting *Elstad* to permit application of the fruits doctrine in certain situations where the initial unwarned confession was constitutionally voluntary. The *Byram* court expressly recognized the split in the circuits between those courts of appeals that "have taken the view that *Elstad* is the end of any use of the fruits doctrine based on a *Miranda* violation" and those that "suggest[] that *Elstad* may be confined to cases where the *Miranda* violation is merely technical." 145 F.3d at 409. The court wrote that in *Elstad*, "the Supreme Court was not laying down an iron rule debarring a 'fruits' argument in all *Miranda* cases," and suppressed the second

confession as "fruit" of the first. *Id.* at 410. Notwithstanding its willingness to weigh in on the debate among the circuits, the First Circuit requested this Court's "guidance" in resolving the circuit conflict.[11]

Similarly, in a unanimous opinion by a panel of Judges Wald, Silberman and Henderson, the District of Columbia Circuit supported the Eighth Circuit's interpretation of *Elstad*. In *United States v. Gale*, 952 F.2d 1412 (1992), while refusing to suppress a subsequent, post-warning statement, the court explained that the case before it was "clearly distinguishable from *Carter*" because the defendant's admissible statement "did not come 'on the heels' of his unwarned statements, but was separated, as in *Elstad*, by almost an hour," and because there was no evidence of a "deliberate 'end run' around *Miranda*." *Id.* at 1418 (quoting *Carter*, *supra*).

A Tenth Circuit panel has also expressed support for the Eighth Circuit's use of a "fruits" analysis when the pre–warning and post–warning confessions are closely linked in time. *See United States v. McCurdy*, 40 F.3d 1111 (10th Cir. 1994). In *McCurdy*, the defendant argued for suppression of his second confession based on the rationale in *Carter*, *supra*. The court of appeals did not reject the *Carter* theory,

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[11] The First Circuit's 1998 request for clarification was prescient — since the *Byram* opinion, another panel of the First Circuit has also characterized the language in *Elstad* as "admittedly imprecise." *United States v. Esquilin*, 208 F.3d 315, 319 (2000). In *Esquilin*, while omitting any mention of *Byram*, and criticizing dicta in, but not the holding of, *Carter*, another First Circuit panel held, on facts distinguishable from *Byram*, *Carter* and *Tankleff* that a second confession following a voluntary, unwarned confession was admissible. *See* 208 F.3d at 321. The *Esquilin* court, of course, would not have had authority to overrule *Byram* had it chosen to discuss *Byram* at all. *See United States v. Wogan*, 938 F.2d 1446, 1449 (1st Cir. 1991). *Esquilin* further evidences the confusion within (in addition to among) the circuits.

but instead distinguished the facts of *McCurdy* from the facts of *Carter*, emphasizing that in *McCurdy*, there was a delay of several hours separating the confessions. *See id.* at 1117. Ultimately, the court of appeals reversed the suppression of the confession because the district court had held erroneously that a *Miranda* violation automatically leads to suppression of "fruits" without more. *Id.* at 1118.

Squarely at odds with the above interpretations of *Elstad*, eight other Courts of Appeals have held that under *Elstad*, a "fruits" analysis is not applicable to a *Miranda* violation unless the initial pre–warning statement was involuntary and/or coerced, as judged under the constitutional voluntariness test. Under this view of *Elstad*, a "fruits" analysis is *never* applicable to a *Miranda* violation as such. The *Miranda* violation is superfluous to the analysis because all that matters is whether the initial confession was involuntary: if it was, then the "fruits" doctrine automatically applies; if it was not, the "fruits" doctrine does not apply.

The Fourth Circuit adopted this view in *Correll v. Thompson*, 63 F.3d 1279, 1289 (1995), holding that a prior confession cannot taint a later confession unless "the first confession is obtained as a result of police coercion." In *United States v. Mendez*, 27 F.3d 126, 130 (1994), the Fifth Circuit aligned itself with this view, stating that "to suppress the derivative evidence, the tactics employed by the officers must be so offensive to a civilized system of justice that they must be condemned." Likewise, the Sixth Circuit held that "[w]here the uncounseled statement is voluntary, and thus not a product of inherently coercive police tactics or methods offensive to due process, there is no fifth amendment violation and the 'fruits' may be admissible." *United States v. Sangineto–Miranda*, 859 F.2d 1501, 1517 (1988). Similarly, in *United States v. Mendoza–Cecelia*, 963 F.2d 1467, 1474 (1992), the Eleventh Circuit held: "Since this confession was not 'actually coerced,' it was obtained in violation of *Miranda* but not in violation of the Fifth

Amendment. Thus under the 'fruit of the poisonous tree doctrine' [the earlier] confession cannot trigger the exclusion of his final admission of guilt."

Consistent with this side of the circuit split, the Ninth Circuit also rejects application of the "fruits" doctrine to a *Miranda* violation when the "initial, non–Mirandized statement was voluntary." *United States v. Polanco*, 93 F.3d 555, 561 (1996). In *United States v. Gupta*, 183 F.3d 615, 616 (1999), the Seventh Circuit explained that *Elstad* "holds that *Miranda* warnings . . . permit a later confession to be used, provided the earlier statements were voluntary." The Third Circuit has also joined this chorus, holding: "Absent constitutionally impermissible coercion in eliciting an initial confession, the administration of adequate *Miranda* warnings before a subsequent voluntary confession validates that confession despite the fact that the earlier confession is inadmissible because the Miranda warnings that preceded it were inadequate." *United States v. Johnson*, 816 F.2d 918, 922 (3d Cir. 1987).

Of course, the Second Circuit in Tankleff's case also weighed in on this side of the circuit split. It concluded that a "fruits" analysis was not appropriate under *Elstad*, even though there was no break between the nearly six hours of interrogation that preceded Marty's *Miranda* warnings and his continued interrogation, and despite the extreme and manipulative police tactics used in his interrogation. App. at 14a. The Second Circuit's reasoning was that the behavior of the police during the pre–warning part of Marty's interrogation was not quite coercive enough. App. at 17a.

If Marty had been able to bring his appeal in a circuit on the other side of the split, such as the Eighth Circuit, his second confession would have been suppressed. The Second Circuit all but said so in the Tankleff opinion. It stated that New York state courts had declined to follow *Elstad*, and continue to apply a "fruits" analysis to *Miranda* violations.

App. at 17a-18a. The Second Circuit explained that, given that Marty's second confession would have been suppressed under the New York state courts' jurisprudence, which employs the "fruits" doctrine,[12] it might appear that the Second Circuit should have excluded his second confession, but it could not because it can only enforce federal rights, which are governed in this instance by *Elstad*.

If Marty's case were subject to the "fruits" analysis employed in the Eighth Circuit, the reviewing court would observe that there was "no passage of time" between his first confession, the warning and his second confession and that they all "occurred as part and parcel of a continuous process." *Carter*, 884 F.2d at 373. Further, the numerous manipulative police tactics (telling Marty his father awoke from a coma and named him as the killer, lying to him about forensics tests on his shower, physically intimidating him during questioning) coupled with Marty's young age and the extensive length of the interrogation without his having eaten anything all day, would cause a reviewing court to find that, even if the constitutional standard of "involuntariness" had not been met, the interrogation was plainly not "totally uncoercive." *Elstad*, 470 U.S. at 365 (Stevens, J. dissenting). Thus, under a "fruits" analysis, Marty's second confession would have been suppressed as the result of a constitutional *Miranda* violation, resulting in a new trial.

The conflict among the circuits is profound and calls for resolution by this Court. Defendants in different circuits are currently subject to radically different treatment with respect to what this Court affirmed in *Dickerson* to be a constitutional right. The constitutional rights of defendants cannot be subject to such accidents of geography.

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[12] The New York courts never reached this part of the *Miranda* analysis because they held that Marty was not in custody prior to receiving *Miranda* warnings.

II.

THE *DICKERSON* DECISION UNDERSCORES THE NEED FOR REVIEW

Review is also warranted because the Circuits that have rejected a "fruits" analysis have done so based on an interpretation of *Elstad* that conflicts with this Court's recent holding in *Dickerson*. In *Dickerson*, this Court observed that the Fourth Circuit had erroneously "concluded that the protections announced in *Miranda* are not constitutionally required." The majority of this Court "disagree[d] with [the Fourth Circuit's] conclusion." *Id.* at 2333. The Court definitively ruled that *Miranda* protections *are* constitutionally required.

The majority acknowledged that "there is language in some of our opinions that supports" the opposite view. *Id.* One of those opinions was *Elstad*, where this Court stated that it was erroneous for the Oregon Court of Appeals to assume that "a failure to administer *Miranda* warnings necessarily breeds the same consequences as police infringement of a constitutional right." 470 U.S. at 304. The Court wrote that a *Miranda* violation could occur "even in the absence of a Fifth Amendment violation," and that a defendant who suffers a *Miranda* violation may have "suffered no identifiable constitutional harm." *Id.* at 306. The *Elstad* court went on to state that "[i]f errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself." *Id.* at 309.

The *Dickerson* majority's holding that the *Miranda* protections are constitutionally required calls into question at least some of the analytical underpinnings of *Elstad* and, as a result, intensifies the existing uncertainty about the scope of that opinion's holding. As Justice Scalia, joined by Justice Thomas, pointed out in the *Dickerson* dissent: "The

proposition that failure to comply with *Miranda*'s rules does not establish a constitutional violation was central to the holding[] of *Elstad*." Justice Scalia also observed that:

> [I]f confessions procured in violation of *Miranda* are confessions "compelled" in violation of the Constitution, the post–*Miranda* decisions I have discussed [including *Elstad*] do not make sense. The only reasoned basis for their outcome was that a violation of *Miranda* is *not* a violation of the Constitution.

Id. at 2342 (emphasis in original).

The bounds of the *Elstad* rule must be addressed by this Court in order to bring them into line with the principles in *Dickerson*. As Justice O'Connor explained, writing for the *Elstad* majority, the theory underpinning *Elstad*, was that the "fruits" doctrine requires that the "fruits of a constitutional violation must be suppressed." 470 U.S. at 308. In the case of a *Miranda* violation, however, "there was no actual infringement of the suspect's constitutional rights." *Id.* Thus, the *Elstad* rule rests significantly on the premise that *Miranda* violations are not constitutional violations, which the *Dickerson* opinion makes clear is incorrect.

The erroneous premise in *Elstad* that *Miranda* violations are not constitutional violations has served as the cornerstone of the holdings of the Courts of Appeals that have extended *Elstad* to rule out *any* "fruits" analysis in cases involving *Miranda* violations but not constitutional involuntariness. *See, e.g., United States v. Elie*, 111 F.3d 1135, 1143 & n.9 (4th Cir. 1997); *Mendez*, 27 F.3d at 131 (5th Cir.); *Sangineto–Miranda*, 859 F.2d at 1516–17 (6th Cir.); *Winsett v. Washington*, 130 F.3d 269, 275–76 (7th Cir. 1997); *Martin v. Wainwright*, 770 F.2d 918, 928 (11th Cir. 1985). Because the holdings in these cases were based on what this Court has determined was an incorrect interpretation of its precedents,

it is critically important that the Court offer guidance as to how *Elstad* is to be interpreted post–*Dickerson*.

Moreover, this issue warrants review sooner rather than later. Because the Courts of Appeals have been confused about the bounds of *Elstad* for fifteen years, further "percolation" will not reap any benefit. There is nothing to gain from each Circuit attempting to reconcile *Dickerson* with its own *Elstad* progeny. Indeed, those courts that have held that *Elstad* directly forecloses a "fruits" analysis for *Miranda* violations may not be free to alter their view of *Elstad's* command even if they believe it has been undermined by *Dickerson*. *See Agostini v. Felton*, 521 U.S. 203, 237-38 (1997). In any event, because *Dickerson* makes the issues more uncertain, the Courts of Appeals are, if anything, likely to move further away from a consensus. Additionally, what the Courts of Appeal might conclude as they try to make sense of *Elstad* in the wake of *Dickerson* will not substantially assist this Court in resolving these issues. This is not a situation involving an obscure issue of statutory or regulatory law, where this Court might benefit from hearing the views of a number of lower courts. The issue is *Miranda* protections and this Court is hardly in need of expertise.

Finally, deferring consideration of the issue would leave intact the glaring injustice done in this case to Marty Tankleff by the federal courts' final denial of *habeas* relief to him on this issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

STEPHEN L. BRAGA
(Counsel of Record)
SCOTT L. NELSON
JENNIFER M. O'CONNOR
MILLER, CASSIDY, LARROCA
& LEWIN, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293–6400

August 28, 2000

Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the seventh day of April two thousand,

Present:

Hon. Wilfred Feinberg,
Hon. Pierre N. Leval,
Circuit Judges.[*]

[Stamp:
Filed
April 7, 2000]

Martin H. Tankleff,

Petitioner-Appellant,

v.

D. A. Senkowski, *et al.*,

Respondent-Appellee.

99-2130

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[*] The Hon. William H. Pauley, III was scheduled to hear this motion, but recused himself and did not participate. The matter was decided by the remaining two judges. *See* Second Circuit Local Rules § 0.14(b).

Appellant has filed, through counsel, a motion for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is denied and the appeal is dismissed. Appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/Lucille Carr

United States Court of Appeals
for the Second Circuit.

Martin H. TANKLEFF, Petitioner-Appellant,
v.
D.A. SENKOWSKI, Superintendent of Clinton Correctional Facility, et al., Defendants-Appellees.

No. 2063, Docket 97-2116.

Argued Aug. 4, 1997

Decided Jan. 12, 1998

Before: CALABRESI, CARBRANES, and PARKER Circuit Judges.

CALABRESI, Circuit Judge:

Martin Tankleff was convicted in New York state court for the murder of his parents, Seymour and Arlene Tankleff. On February 7, 1996, he filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The United States District Court for the Eastern District of New York (Thomas C. Platt, *Judge*) denied Tankleff's petition on January 30, 1997. On February 28, 1997, Judge Platt granted Tankleff a certificate of appealability.

Tankleff raises four main claims in his habeas petition. First, he asserts that his Fifth Amendment rights were violated by the manner in which his confession was obtained. Second, he contends that the jury selection process violated his constitutional rights. Third, he argues that the prosecution violated his rights under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by

withholding evidence that he could have used in the cross-examination of two key witnesses. Finally, he suggests that certain arguments made by the prosecution in summation violated his due process rights.

After careful analysis of all of Tankleff's claims, we have concluded that he is entitled to federal court relief on only one of them – his claim that the trial court erred in refusing to consider Tankleff's objection that the prosecution had improperly used its peremptory strikes against African-American jurors. The trial court refused to entertain this objection in the mistaken belief that, because Tankleff is not himself an African-American, he could not challenge the prosecution's use of its peremptory strikes against African American jurors under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). But the Supreme Court made clear in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), that a *Batson* claim is in no way precluded by the fact that the defendant's race differs from that of the excluded jurors. *See id.* at 415-16, 111 S.Ct. at 1373-74.

Judge Platt recognized that the state court had erred in this regard, but held that the error was harmless. Harmless error analysis is inappropriate in this context, however, because exclusion of jurors on the basis of race is a structural error that can *never* be harmless. *See Peck v. United States*, 106 F.3d 450, 454 (2d Cir. 1997) ("Structural errors 'defy analysis by harmless error standards . . ..'") (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 629-30, 113 S.Ct. 1710, 1717-18, 123 L.Ed.2d 353 (1993)). Accordingly, we hold that Tankleff is entitled to a hearing on his *Batson* claim, and remand the case to the district court for further proceedings. As to all of Tankleff's other claims, we find that one of them warrants federal habeas relief.

I. FACTS

The relevant facts – as determined by the state court and recounted in the testimony of various police officers – are as follows. Police arrived at the Tankleff residence in a wealthy section of Belle Terre, New York, at 6:17 a.m. on September 17, 1998, in response to Martin Tankleff's 911 phone call. They found seventeen-year-old Tankleff outside the house, shouting that someone had murdered his parents. Arlene Tankleff was lying dead in the master bedroom of the house, while Seymour Tankleff was unconscious and gravely wounded in the study. Tankleff said he had discovered his parents' bodies when he awoke for school. He also told the police that he believed his father's former business partner, Jerry Steuerman, had committed the crime. Steuerman owed Seymour Tankleff a great deal of money, and had been at their house the evening before for a late-night poker game.

Shortly after the police arrived, one officer instructed Tankleff and his brother-in-law, Ronald Rother, to leave the house and go to separate police cars so that they wouldn't "contaminate each other's story." At 6:37 a.m., Tankleff went outside and sat in the front seat of a police car. Starting at around 7:40 a.m., a series of homicide detectives interviewed Tankleff near the police cars. At no time during these interviews was Tankleff given the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The detectives discussed what Tankleff had told each of them and, noting some inconsistencies in his accounts of the events of that morning, decided to take him to police headquarters for further questioning. At this point, the police concede, they considered Tankleff a suspect. At 8:40 a.m., Tankleff agreed to go with Detective McCready to the police station. McCready questioned him further during the forty-minute drive. At 9:40 a.m., Detectives McCready and Rein took Tankleff to a ten-foot by ten-foot, windowless

room where he was interviewed continuously for the next two hours.

The defense has characterized this interview as "increasingly hostile." The government disputes this interpretation, but acknowledges that Tankleff was questioned in detail about inconsistencies in his story and that the detectives openly expressed their disbelief with his version of the morning's events. At one point, they asked him to demonstrate how he performed first aid on his father. Detective McCready then leaned forward and said that he found Tankleff's account "ridiculous and unbelievably absurd." The government asserts that while the detectives "at times raised and lowered their voices as they related inconsistencies in [Tankleff's] account to [them], and indeed quickened the pace of the interview at approximately 11:30 to 11:40 a.m., they never yelled at or somehow "browbeat" Tankleff. At approximately 11:45 a.m., McCready left the interview room and faked receiving a telephone call. On the phone, he spoke in a voice loud enough to be overheard by Rein, who was still in the interview room with Tankleff, and presumably was overheard by Tankleff as well. After a few minutes, McCready hung up the phone and returned to the interview room. He said that he had just spoken with a detective at the hospital and that doctors had pumped Seymour Tankleff full of adrenaline, that he had come out of the coma, and that he had accused his son, Martin. This story was not true. Seymour remained in a coma until his death a few weeks later, never awakening and never accusing his son of the crime.

Tankleff continued to deny having committed the crime, saying that his father might have said that because Tankleff was the last person he saw before falling unconscious. Rein asked if Seymour was conscious when Tankleff "beat and stabbed him." Tankleff then offered to take a lie detector test, which the police refused to

administer. Rein asked, "Marty what should we do to a person that did this to your parents?" Tankleff responded, "Whoever did this to them needs psychiatric help." At this point, Tankleff said, "Could I have blacked out and done it?" and asked whether he could have been "possessed." The detectives encouraged him to say more, and Tankleff uttered, "[I]t's coming to me."

Only then, at around 11:54 a.m., did Detective McCready stop the questioning and, for the first time, give Tankleff the *Miranda* warnings. Tankleff waived his rights, and the interrogation continued. Tankleff stated, "I need psychiatric help," and then proceeded to describe to the detectives the reasons for his actions, the sequence of events, and the manner in which he had committed the acts. He was placed under formal arrest later that afternoon.

The trial court denied Tankleff's motion to suppress the confession, and Tankleff was convicted of both murders after a jury trial. He was sentenced to two consecutive indeterminate terms of twenty five years to life. On direct appeal, the New York Supreme Court, Appellate Division affirmed his conviction in a three-to-two-decision. *See People v. Tankleff*, 199 A.D.2d 550, 606 N.Y.S.2d 707 (App.Div. 1993), *aff'd* 84 N.Y.2d 992, 622 N.Y.S.2d 503, 646 N.E.2d 805 (1994). The two dissenting judges believed that Tankleff's confession was obtained in violation of *Miranda* and wrote that "[i]n view of the absence of any other evidence connecting the defendant to the murders, except for the confession which he disavowed at the trial, the indictments should be dismissed." *Id.* 606 N.Y.S.2d at 712 (O'Brien, Eiber, JJ., dissenting). The dissenting judges also thought that the prosecutor's improper comments during closing arguments warranted reversal. *See id.* at 712-13. The New York Court of Appeals unanimously affirmed the appellate division's decision upholding Tankleff's conviction. *See People v. Tankleff*, 84 N.Y.2d 992, 622

N.Y.S.2d 503, 646 N.E.2d 805 (1994). Tankleff filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, which the district court denied.

II. DISCUSSION

A. Certificate of Appealability

As a preliminary matter, the state argues that Tankleff is required to obtain a certificate of appealability ("COA") in accordance with the requirements established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214, and that the COA granted by the district court was defective under that Act. The AEDPA replaced the old certificate of probable cause "("CPC") with the new COA. *See* 28 U.S.C. § 2253(c)(2), (3) (West Supp.1997). In order to obtain a CPC, a petitioner was required to "make a substantial showing of the denial of [a] federal right." *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394-95, 77 L.Ed.2d 1090 (1983) (internal quotation marks omitted and alteration in original). The statute as amended requires the same showing from petitioners seeking a COA, *see* 28 U.S.C. § 2253(c)(2), but also provides that COA "shall indicate which specific issue or issues satisfy" that standard, *id* § 2253(c)(3). The state contends that the district court's order granting Tankleff a COA was insufficiently specific to satisfy the requirements of the amended § 2253(c)(3). Furthermore, the state argues, the district court's opinion suggests that only the *Brady* issue satisfies the requirement of § 2253(c)(2). The state, therefore, asks us to amend the COA to limit the appeal to the *Brady* issue or, in the alternative, to remand the case to the district court for more specific findings.

The AEDPA does not, however, govern the case before us because Tankleff filed his habeas petition before

the new law went into effect. In *United States v. Perez*, 129 F.3d 255 (2d Cir.1997), we held that the requirements of § 2253 did not apply to a defendant who had filed his § 2253(c) petition before the effective date of the AEDPA, despite the fact that both the denial of his petition by the district court and the filing of his appeal occurred after this date. *See id.* at 260; *see also Lindh v. Murphy*, _____ U.S. ___, _____, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997) (holding that another provision of the AEDPA, codified at 28 U.S.C. § 2254(d), did not apply retroactively to cases pending before the statute's effective date). We see no reason to treat § 2254 petitions differently from § 2255 petitions in terms of the retroactive application of the requirements of § 2253(c), and so hold that Tankleff was not required to obtain a COA.

As a result, we evaluate what the district court termed a "COA" under the old "CPC" rubric and need not determine whether it is specific enough to satisfy the revised § 2253. As stated above, in order to receive a CPC, a petitioner must "make a substantial showing of the denial of [a] federal right." *Barefoot*, 463 U.S. at 893, 103 S.Ct. at 3394 (internal quotation marks omitted and alteration in original). A petitioner need not show that he would prevail on the merits, but "must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Id.* at 893 n. 4, 103 S.Ct. at 3394-95 n. 4 (internal quotation marks and citation omitted, emphasis added, and alterations in original); *accord Nelson v. Walker*, 121 F.3d 828, 832 (2d Cir. 1997). Tankleff's claims clearly satisfy this standard: we have determined that Tankleff's *Batson* claim has substantial merit; the Appellate Division split three-to-two on both the *Miranda* question and the propriety of the prosecution's summation; and the district court thought that the *Brady*

issue was a "close call." It follows that Tankleff's claims are all properly before this court.

B. Tankleff's Confession

Tankleff argues that his confession should have been suppressed because it was involuntary and because it was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). These two claims are interrelated, but analytically distinct. If a defendant's confession was obtained by "techniques and methods offensive to due process' or under circumstances in which the suspect clearly had no opportunity to exercise 'a free and unconstrained will," the statements are inadmissible under the Fifth Amendment. *Oregon v. Elstad*, 470 U.S. 298, 304, 105 S.Ct. 1285, 1290, 84 L.Ed.2d 222 (1985) (quoting *Haynes v. Washington*, 373 U.S. 503, 515, 514, 83 S.Ct. 1336, 1344, 1343-44, 10 L.Ed.2d 513 (1963)) (citations omitted). The prophylactic rule of *Miranda* sweeps more broadly than the Fifth Amendment itself, however, and requires the suppression of some confessions that, while perhaps not actually involuntary, were obtained in the presumptively coercive environment of police custody. *See, e.g., id.* at 306-07, 105 S.Ct. at 1291-92; *New York v. Quarles*, 467 U.S. 649, 654, 104 S.Ct. 2626, 2630-31, 81 L.Ed.2d 550 (1984) ("The *Miranda* Court . . . presumed that interrogation in certain custodial circumstances is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights.") (footnote omitted).

A suspect is entitled to *Miranda* warnings only if he or she is interrogated while "in custody." *See, e.g., Thompson v. Keohane*, 516 U.S. 99, 100-01, 116 S.Ct. 457, 460, 133 L.Ed.2d 383 (1995). The trial court found that Tankleff was not in custody prior to the administration of the

Miranda warnings and that his confession was therefore admissible. Similarly, the three-judge majority of the Appellate Division held that Tankleff was not in custody when he arrived at the police headquarters, and stated that Detective McCready's ruse was irrelevant to Tankleff's custody status. *See Tankleff*, 606 N.Y.S.2d. at 710. Since Tankleff was not deemed to be in custody before he received the *Miranda* warnings, the appellate court held that the admission of his confession was proper. *See id.*

The two dissenting judges on the Appellate Division believed that Tankleff was clearly in custody after Detective McCready's ruse and said that "no reasonable, innocent person who found himself identified as the perpetrator in this manner would have believed that he was free to leave." *Id.* at 712 (O'Brien, Eiber, JJ., dissenting). In addition, the dissenters noted, "even after employing the ruse, the interrogating detectives continued to question the defendant without the benefit of *Miranda* warnings until he began to break and give inculpatory statements." *Id.* The dissenters concluded that "[u]nder these circumstances, the issuance of the *Miranda* warnings to the defendant shortly after the ruse was insufficient to dissipate the taint of the previous improper police conduct, as the defendant was subjected to continuous custodial questioning." *Id.* (citing *People v. Chapple*, 38 N.Y.2d 112, 378 N.Y.S.2d 682, 341 N.E.2d 243 (1975)).

The New York Court of Appeals stated that "[t]here is support in the record for the undisturbed finding of the trial court that defendant was not in custody and thus was not entitled to *Miranda* warnings at any point before he indicated his desire [to confess.]" And in view of its "limited power to review mixed questions of law and fact," the court affirmed the Appellate Division. *See Tankleff*, 622 N.Y.S.2d at 504, 646 N.E.2d 805 (citing *People v. Harrison*, 57 N.Y.2d 470, 457, N.Y.2d 199, 443 N.E.2d 447 (1982)).

The Supreme Court has held that two discrete inquiries are involved in determining whether a person is "in custody" for *Miranda* purposes: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson*, 516 U.S. at 112, 116 S.Ct. at 465 (footnote omitted). The first question is purely factual, and the state court's answer to it is afforded a presumption of correctness under § 2254(d).[1] The second determination is a mixed question of fact and law qualifying for *de novo* review by the habeas court. *See id.*

In the case before us, the first determination – "what happened" – is not really in dispute. The police interrogated Tankleff on and off from 6:17 to 11:54 a.m. without giving him *Miranda* warnings. The only dispute is over the ultimate legal issue – whether Tankleff was "in custody" at any point before 11:54 a.m. – a question on which we owe no special deference to the state court's findings.

In determining whether a suspect was in custody, we look at all the circumstances surrounding the interrogation. The relevant inquiry is "how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 351-52, 82 L.Ed.2d 317 (1984). And custody exists for *Miranda* purposes if a reasonable person in that position would "have felt he or she was not at liberty to terminate the

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[1] As noted above, since Tankleff's petition was filed before the effective date of the AEDPA, we evaluate his claims under pre-AEDPA case law and standards. *See Lindh v. Murphy*, ____ U.S. ____, ____, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997) (holding that the changes under AEDPA to 28 U.S.C. § 2254(d) do not apply retroactively to cases pending before AEDPA's effective date).

interrogation and leave." *Thompson*, 516 U.S. at 112, 116 S.Ct. at 465. As the Second Circuit recently stated:

> The test used in determining whether a defendant was in custody is an objective one that (a) asks whether a reasonable person would have understood herself to be subjected to restraints comparable to those associated with a formal arrest, and (b) focuses upon the presence or absence of affirmative indications that the defendant was not free to leave. An accused is in custody when, even in the absence of an actual arrest, law enforcement officials act or speak in a manner that conveys the message that they would not permit the accused to leave.

United States v. Kirsh, 54 F.3d 1062, 1067 (2d Cir.) (internal quotation marks and citation omitted), *cert. denied*, 516 U.S. 927, 116 S.Ct. 330, 133 L.Ed.2d 230 (1995); *see also United States v. Morales*, 834 F.2d 35, 38 (2d Cir. 1987) (a custodial setting is evidenced by "inherently coercive pressures that tend to undermine the individual's will to resist and to compel him to speak").

Courts have looked at various factors in making this determination. These include: whether a suspect is or is not told that she is free to leave, *see Campaneria v. Reid*, 891 F.2d 1014, 1021 n. 1 (2d Cir.1989); the location and atmosphere of the interrogation, *see Oregon v. Mathiason*, 429 U.S. 492, 494-95, 91 S.Ct. 711, 713-14, 50 L.Ed.2d 714 (1977); the language and tone used by the police, *see United States v. Guarno*, 819 F.2d 28, 31-32 (2d Cir.1987); whether the suspect is searched, frisked, or patted down, *see United States v. Wilson*, 901 F.Supp. 172, 175 (S.D.N.Y. 1995); and the length of the interrogation, *see Berkemer*, 468 U.S. at 437-38, 104 S.Ct. at 3148-49.

Based on the totality of the circumstances, we believe that Tankleff was in custody and hold that he was entitled to the *Miranda* warnings at some point prior to 11:54 a.m., when he was finally advised of his rights. For the last two hours, he had been subjected to increasingly hostile questioning at the police station, during which the detectives had accused him of showing insufficient grief, had said that his story was "ridiculous" and "absurd," and had added that they simply "could not accept" his explanations. Finally, at 11:45 a.m. they told him that his father had woken up from a coma and accused him of the attack. If not before, then certainly by this point in the interrogation no reasonable person in Tankleff's position would have felt free to leave. Tankleff should, therefore, have been advised of his rights as required by *Miranda* much earlier than he was, and all of the inculpatory statements he made before receiving the warnings should have been suppressed.

Our analysis does not end here, however, because the police did eventually, if belatedly, administer the *Miranda* warnings. Tankleff then waived his rights, and repeated and elaborated upon his confession. Under the Supreme Court's holding in *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), it does not follow that these later statements must be suppressed as "fruit" of the original *Miranda* violation. In *Elstad*, the Court stated:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.

Id. at 309, 105 S.Ct. at 1293. Thus, the Court stated, "[t]hough *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Id.*

We must, therefore, consider whether the circumstances surrounding Tankleff's "first," unwarned confession were so coercive as to prevent him from making a subsequent knowing and voluntary waiver of his rights, thereby requiring the suppression of his "second," warned confession. Serious pressures inherent in custodial interrogation will inevitably be present in any case under *Elstad* – which, after all, addresses situations in which a defendant was in custody and entitled to *Miranda* warnings at some point before those warnings were given. Thus, we cannot rely solely on the *Miranda* presumption that custodial interrogation is coercive in determining whether Tankleff's second confession must be suppressed. We must look, once again, to the totality of the circumstances. *Cf. Campaneria*, 891 F.2d at 1019-20 (examining "all the circumstances surrounding the law enforcement officials' conduct to ascertain whether it overcame the accused's will to resist and brought about a confession that was not freely self-determined"); *United States v. Anderson*, 929 F.2d 96, 99 (2d Cir.1991) (in determining the voluntariness of a confession, courts look to the accused's characteristics, the conditions of the interrogation, and the conduct of law enforcement officials); *Green v. Scully*, 850 F.2d 894, 901-02 (2d Cir.1988) (same).[2]

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[2] In this respect, *Elstad* was a relatively easy case. In *Elstad*, the Court noted:

Neither the environment not the manner of either 'interrogation' was coercive. The initial conversation took place at midday, in the living

We have previously stressed the fact-specific nature of these sorts of determinations. As we said in *Green v. Scully*, "each case rests on its own state of facts and . . . what was adequate in one case to produce an involuntary confession does not establish that the same result has been created in a different, but somewhat similar set of circumstances." 850 F.2d at 902. *Compare Anderson*, 929 F.2d at 102 ("Under the totality of the circumstances, [DEA's agent's] statements contributed to the already coercive atmosphere inherent in custodial interrogation and rendered [the defendant's] first confession involuntary as a matter of law"' and barred the admission of his second confession under *Elstad*); and *Quartararo v. Mantello*, 715 F.Supp. 449, 456-66 (E.D.N.Y.) (granting *habeas* to fifteen-year-old defendant who, without receiving *Miranda* warnings, had been subjected to four hours of incommunicado interrogation and was told by police that another witness had accused him of the murder), *aff'd*, 888 F.2d 126 (2d Cir.1989); *with Green*, 850 F.2d at 904 (holding that police tactics "considered together did not overbear [the defendant's] will and bring about his confession").

Finally, it bears emphasizing that *Elstad* is not a license for police to neglect the *Miranda* warnings in order more easily to obtain a confession, on the theory that they can remedy this omission after the fact. As we have stated,

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room area of respondent's own home, with his mother in the kitchen area, a few steps away. Although in retrospect the officers testified that respondent was then in custody, at the time he made his statement he had not been informed that he was under arrest.

470 U.S. at 315, 105 S.Ct. at 1296. And the court concluded, "[w]hatever the reason for the [police officer's] oversight" in failing to administer the *Miranda* warnings earlier, "the incident had none of the earmarks of coercion." *Id.* at 316, 105 S.Ct. at 1296.

"the use of coercive and improper tactics in obtaining an initial confession may warrant a presumption of compulsion as to a second one, even if the latter was obtained after properly administered *Miranda* warnings." *Anderson*, 929 F.2d at 102 (citing *Elstad*, 470 U.S. at 314, 105 S.Ct. at 1296). Thus, we look to *Miranda's* "'twin rationales-trustworthiness and deterence' - to see whether suppression of the second statement would serve the general goal of deterring unlawful police conduct and the Fifth Amendment goal of assuring the receipt of trustworthy evidence." *Id.* (quoting *Elstad*, 470 U.S. at 308, 105 S.Ct. at 1292-93).

The issue is a close one. But, based on all the circumstances, we conclude that, under *Elstad*, the interrogation that took place before the reading of the *Miranda* warnings barely did not entail that degree of coercion that would irredeemably taint Tankleff's "second," *Mirandized* confession. Furthermore, and crucially important, there is no indication in the record that Tankleff did not understand his rights once he was given the warnings or that his subsequent waiver of those rights was anything but knowing and voluntary. Accordingly, we hold that Tankleff's "second" confession was properly admitted.

The court should, nonetheless, have suppressed Tankleff's inculpatory pre-*Miranda* statements. Since those statements were, however, brief and substantially the same as some of his later, admissible confession, this error was harmless beyond a reasonable doubt. See *Rollins v. Leonardo*, 938 F.2d 380, 382 (2d Cir.1991) (per curiam) (applying harmless error doctrine to *Miranda* violation); *see also Arizona v. Fulminante*, 499 U.S. 279, 306-12, 111 S.Ct. 1246, 1262-66, 113 L.Ed.2d 302 (1991) (applying harmless error analysis even to a coerced confession).

There remains one loose end with respect to Tankleff's *Miranda* claims. We note that the state courts

did not distinguish between Tankleff's "first" and "second" confessions. They presumably did this in part because they-incorrectly under *federal* law-held that Tankleff was not in custody when he made his "first" confession. But they, perhaps, also failed to distinguish between the confessions because the New York Court of Appeals has declined on state constitutional grounds to follow the rule of *Oregon v. Elstad*. *See People v. Bethea*, 67 N.Y.2d 364, 502 N.Y.S.2d 713, 714, 493 N.E.2d 937, 938 (1986) (per curiam) ("We conclude that the mandate of N.Y. Constitution, article I, § 6 that '[n]o person . . . shall "'be compelled in any criminal case to be a witness against himself' would have little deterrent effect if the police know that they can as part of a continuous chain of events question a suspect in custody without warning, provided only they thereafter question him on her again after warnings have been given.") (alteration in original). Thus, under New York law the rule with respect to *Miranda* warnings remains that "[l]ater is too late, unless there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning." *People v. Chapple*, 38 N.Y.2d 112, 378 N.Y.S.2d 682, 685-86, 341 N.E.2d 243, 245-46 (1975); *Bethea*, 502 N.Y.S.2d at 714, 493 N.E.2d 937 ("The rule of the *Chapple* case, therefore, continues as a matter of State constitutional law, to govern the admissibility of statements obtained as a result of continuous custodial interrogation.").

It might appear-given the state court holdings rejecting *Elstad* and given our decision that Tankleff was in custody, thereby making his "first" confession inadmissible under *Miranda*-that we should also deem his second confession to be exludable. But *we* can only grant habeas releif based on violations of *federal* rights, *see* 28 U.S.C. § 2254(d)(1). Thus, it is not for us to say whether Tankleff might or might not have any claim based on state

consititutional law as a result of our holding that Tankleff was, under *Miranda* and its federal progeny, in custody at the time of his "first" confession. We note that the validity of such a claim would seem to turn on whether the definition of "custody" under the New York constitution tracks the definition of that term under the federal constitution. *Cf. Michigan v. Long*, 463 U.S. 1032, 1037-40, 103 S.Ct. 3469, 3474-76, 77 L.Ed.2d 1201 (1983) (discussing the difficulties faced by federal courts in ascertaining "whether state courts have used federal law to guide their application of state law or to provide the actual basis for the decision that was reached"); *South Dakota v. Neville*, 459 U.S. 553, 556-58 n. 5, 103 S.Ct. 916, 919 n. 5, 74 L.Ed.2d 748 (1983) (same).

C. Jury Selection

1. Tankleff's Absence from the In-Chambers Questioning of Potential Jurors

A criminal defendant is entitled "to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta v. California*, 422 U.S. 806, 819-20 n. 15, 95 S.Ct. 2525, 2533 n. 15, 45 L.Ed.2d 562 (1975); *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970). It is well-established that the impaneling of the jury is one such stage. *See, e.g.*; *United States v. Hernandez*, 873 F.2d 516, 518 (2d Cir. 1989). Tankleff claims that his constitutional right to attend all material portions of his trail was violated by the procedure employed by the trial court in screening potential jurors.

Because of extensive pretrial publicity, the court followed a special process in impaneling the jury. First, approximately 500 potential jurors were questioned in open court about 1) whether they had already formed an opinion about Tankleff's guilt based on newspaper and television

reports and 2) whether they wished to be excused due to the length of the trial. Tankleff was present at this stage of the screening. The field was thus narrowed to roughly 150 prospective jurors, who were then individually quesitoned in chambers by the trial judge and attorneys for both the prosecution and defense. These interviews focused on the potential jurors' ability to be fair and impartial in light of the media coverage of the case. Tankleff did not attend these interviews, but his trial counsel did and raised no objection to the process. Finally, the jurors who remained after the in-chambers interviews were placed in the jury box and subjected to the usual voir dire, which Tankleff attended.

As an initial matter, the state contends that Tankleff is barred from advancing this claim because he failed to object to the procedure at trial. Tankleff did, however, raise these arguments in his briefs on direct review in the state courts. The Appellate Division rejected the claim without discussion, stating simply, "We have examined the defendant's remaining contentions and find them to be without merit." *Tankleff*, 606 N.Y.S.2d at 711. Similarly, the Court of Appeals of New York said only, "We have examined defendant's remaining contentions and find them to be either meritless or unpreserved." *Tankleff*, 622 N.Y.S.2d at 505, 646 N.e.2d 805.

The Supreme Court has held that a procedural default does not bar consideration of a federal claim on habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar. *Coleman v. Thompson*, 501 U.S. 722, 735, 111 S. Ct. 2546, 2557, 115 L.Ed.2d 640 (1991) ("In habeas, if the decision of the last state court to which the petitioner presented his federal claims . . . did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition."). It is unclear whether the New York

Court of Appeals rejected Tankleff's jury selection claim because it was unpreserved or because it was deemed meritless as a matter of federal constitutional law. The Second Circuit may therefore address the claim.

An analytically distinct issue from the procedural bar is whether, as a matter of substantive law, Tankleff waived his right to be present during this particular stage of voir dire. Because the judge discussed the process in open court several times while Tankleff was present, it is reasonable to conclude that Tankleff knew what was going on. There is no indication that he or his lawyers were under the mistaken belief that he could not attend the *in camera* sessions. The far more likely explanation for his absence is that he and his lawyers did not think it was important for him to be present at this tedious, routine screening designed to eliminate jurors who had been prejudiced by pretrial publicity. Under the circumstances, we think waiver may properly be inferred from the conduct of the defendant and his attorneys. *See Hernandez*, 873 F.2d at 518 ("The right to be present at one's trial is . . . subject to waiver. A defendant can waive that right expressly, or can do so effectively by failing to appear at trial."); *Government of the Virgin Islands v. George*, 680 F.2d 13, 15 n. 4 (3d Cir. 1982) (defendant may "waive his right to be present during the period of often routine voir dire questioning") (internal quotation marks and citation omitted); *see also United States v. Gagnon*, 470 U.S. 522, 528, 105 S.Ct. 1482, 1485, 84 L.Ed.2d 486 (1985) (noting that a district court "need not get an express 'on the record' waiver from the defendant for every trial conference which a defendant may have a right to attend"). We, therefore, reject Tankleff's claim that his rights were violated by the pre-screening procedure.

2. Batson *Challenge*

Tankleff's *Batson* claim, on the other hand, has merit. Three African-American jurors remained in the pool after the pre-screening process. The government used peremptory challenges to strike the first two. The third black venire member was also initially challenged by the state. But the prosecutor later accepted him as the fourth alternate in order to avoid having to call additional jurors for pre-screening. Tankleff's trial counsel objected to each of these peremptory strikes. The court rejected the defense objections, stating that "[Tankleff] obviously is not black" and therefore could not raise a *Batson* challenge.

The Supreme Court has held, however, that a criminal defendant may object to race-based exclusion of jurors "whether or not the defendant and the excluded jurors share the same races." *Powers*, 499 U.S. at 402, 111 S. Ct. at 1365. *Powers*, moreover, was decided while Tankleff's case was still pending on direct appeal, and therefore applies to his case. *See Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (holding the *Batson* rule applicable to cases pending on direct appeal); *United States v. Stavroulakis*, 952 F.2d 686, 697 (2d Cir.1992) (applying *Powers* to case pending on direct appeal).

The district court held that the trial judge's failure to consider Tankleff's *Batson* claim was "harmless error" because "[b]oth the victims and petitioner are white" and "there was clearly no racial aspect to this case and no reason to assume an illegitimate reason for peremptory challenges." Harmless error analysis is inappropriate, however, in the case of so-called "structural errors." *See Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991). The Supreme Court distinguished in *Fulminante* between "trial errors," which are subject to

harmless error review, and "structural errors," which are not. The Court defined trial errors as those "which occurred during the presentation of the case to the jury, and which therefore may be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 307-08, 111 S.Ct. at 1264. In contrast, structural defects affect "[t]he entire conduct of the trial from beginning to end." *Id.* at 309, 111 S.Ct. at 1265. Such structural defects were said to include, for example, denying the right to self-representation and, significantly for our purposes, "unlawful exclusion of members of the defendant's race from a grand jury." *Id.* at 310, 111 S.Ct. at 1265.

As the Supreme Court observed in *Batson*, "the basic principles prohibiting exclusion of persons from participation in jury service on account of their race are essentially the same for grand juries and for petit juries." 476 U.S. 79, 84 n. 3, 106 S.Ct. 1712, 1716 n. 3 (internal quotation marks and citation omitted). Because the effects of racial discrimination during voir dire "may persist through the whole course of the trial proceedings," *Powers*, 499 U.S. at 412, 111 S.Ct. at 1371, we hold that a *Batson/Powers* claim is a structural error that is not subject to harmless error review. *See Ford v. Norris*, 67 F.3d 162, 171 (8th Cir. 1995) (holding that a "constitutional violation involving the selection of jurors in a racially discriminatory manner is a 'structural defect' . . . which cannot be subjected to a harmless error analysis.") *Rosa v.Peters*, 36 F.3d 625, 634 n. 17 (7th Cir. 1994) (holding that harmless error analysis is inappropriate in a *Powers* case); *Ramseur v. Beyer*, 983 F.2d 1215, 1225 n. 6 (3d Cir. 1992) (in banc) ("[H]armless error analysis is inappropriate in cases involving discrimination in the jury selection process."), *cert denied*, 508 U.S. 947, 113 S.Ct. 2433, 124 L.Ed.2d 653 (1993).

Assuming that the error is harmless because the defendant is white and there is no racial aspect to the case would perforce vitiate the rule of *Powers* – that a criminal defendant has third-party standing to raise the equal protection claims of the excluded jurors. *Powers*, 499 U.S. at 415, 111 S.Ct. at 1373. Significantly, the Court in *Powers* emphasized that a defendant is injured even when the excluded jurors are of a different race than his own because racial discrimination in jury selection "casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt." *Id.* at 411, 111 S.Ct. at 1371 (citation and internal quotation marks omitted).

Despite the fact that Tankleff's objections were cut off by the state trial court, we believe that he has made out a prima facie case under *Powers* and *Batson*. In *Powers*, the Court observed that it might be more difficult to make out a case of discrimination in situations involving a defendant and venireperson of different races, but declined to elaborate on what showing would be necessary in such cases. Instead, the Court stated that "[i]t remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice." 499 U.S. at 416, 111 S.Ct. at 1374.

Neither the trial courts nor the courts of appeals have as yet developed clear standards for what prima facie showing is required under *Powers*. In one case, we held that "[r]eference merely to the race of one excused venireman, without more, is insufficient to raise an inference of discrimination" under *Powers*. *Stavroulakis*, 952 F.2d at 696. We went on to suggest, however, that "[w]hen other factors such as patterns of strikes or lines of questioning combine with race, the inference of discrimination may arise." *Id.* Courts have used a similar multifactor analysis

in analyzing prima facie showings under *Batson*. *See, e.g., Turner v. Marshall*, 63 F.3d 807, 812 (9th Cir.1995) ("There is no magic number of challenged jurors which shifts the burden to the government to provide a neutral explanation for its actions.") (quoting *United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir.1989)); *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) (the striking of even a single juror based on race violates the constitution, and the court must consider not only the number of minority jurors struck but also the relevant circumstances surrounding the challenges); *United States v. Horsley*, 864 F.2d 1543, 1546 (11th Cir.1989) (per curiam) (same).

In considering whether a defendant has made out a prima facie case under *Powers*, we believe that courts should consider how many members of the cognizable racial group are in the venire panel from which the petit jury is chosen, the pattern of strikes against racial group jurors in the particular venire, the prosecutor's statements and questions during selection, as well as any other relevant circumstances. *See Batson*, 476 U.S. at 97, 106 S.Ct. at 1723 (the pattern of strikes and behavior of prosecutor are relevant to a prima facie case); *cf. Jones v. Ryan*, 987 F.2d 960, 970-71 (3d Cir. 1993) (setting forth a five-factor test for determining when a prima facie case has been established under *Batson*).

In the case before us, we have little to go on besides the statistics because the trial court cut off defense counsel before he could complete his argument. Nevertheless, the fact that the government tried to strike the only three blacks who were on the panel constitutes a sufficiently dramatic pattern of actions to make out a prima facie case.[3] *See*

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[3] In addition, the defense has put forward an argument for why the prosecution might have stricken jurors of on the basis of race, despite the fact that the defendant was white and there was no racial aspect to the

United States v. Alvarado, 923 F.2d 253, 255-56 (2d Cir. 1991) (finding a prima facie case when the prosecution struck four out of seven minority jurors); *see also McCain v. Gramley*, 96 F.3d 288, 292 (7th Cir.1996), *cert denied*, ____ U.S. ____, 117 S.Ct. 1320, 137 L.Ed.2d 482 (1997) ("[W]here there are only a few members of a racial group on the venire panel and one party strikes each one of them," the inference of discrimination may arise); *Chinchilla*, 874 F.2d at 698 & n. 4 (in considering a challenge of two minority jurors, finding significant the fact that "*all* the Hispanic jurors were challenged."); *cf. Turner*, 63 F.3d at 813 (finding a prima facie case when the prosecution struck five out of nine available minority jurors); *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir.1987) (finding prima facie case when the prosecution struck five out of seven blacks).

Since Tankleff has established a prima facie case, the burden shifts to the government to proffer race-neutral explanations for its use of peremptory challenges. *See* Batson, 476 U.S. at 97-98, 106 S.Ct. at 1723-24. The court must then determine whether the defendant has established purposeful discrimination in the prosecutor's use of peremptory challenges. We recognize the difficulty in making such a determination several years after the trial occurred. In the past, this court has noted that "there are cases where the passage of time may impair a trial court' s ability to make a reasoned determination of the prosecutor's state of mind when the jury was selected. Where such

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case. A pivotal issue at trial was the credibility of the police officers concerning Tankleff's confession. And, the defense argues, there is a belief in certain parts of our society that African-Americans are less likely to trust the police than are whites. Such a stereotype may or may not exist (the record does not speak to the issue), but we note that "to say that the race of the defendant may be relevant to discerning bias in some cases does not mean that it will be a factor in others, for race prejudice stems from various causes and may manifest itself in different forms." *Powers*, 499 U.S. at 416, 111 S.Ct. at 1374.

[difficulty] demonstrably exists, there must be a new trial." *Brown v. Kelly*, 973 F.2d 116, 121 (2d Cir. 1992). Similarly, the Seventh Circuit noted in one *Batson* case that the passage of six years since the habeas petitioner's trial meant that a reconstruction hearing to determine whether discrimination had occurred might well be unsatisfactory. *See Rosa*,. 36 F.3d at 635. The court remanded the case to the district court, leaving it up to the district judge to decide whether holding a hearing would be productive or whether the defendant should receive a new trial without more. *See id.*

In the case before us, the state indicated its willingness, both in its brief and at oral argument, to attend a hearing and come forward with race-neutral reasons for its peremptory challenges. This provides some encouragement that a reconstruction hearing may be a worthwhile exercise. In the past, when we have remanded similar claims to the district court, we have given the district court discretion 1) to apply the correct analysis on the existing record; 2) to develop the record further; or 3) to return the case to the state trial court on a conditional writ of habeas corpus so that the state court could conduct the inquiry on its own. *See, e.g., Howard v. Senkowski*, 986 F.2d 24, 30 (2d Cir.1993).

In view of the existence of prima facie Batson violation, we remand the case before us to the district court, so that it may, in its discretion, itself hold a hearing on petitioner's *Batson* claims or send the case back to state court for such a hearing. Should the district court conclude, however, that the passage of time has made such a reconstruction hearing in either state or federal court unproductive, the court must then rule that defendant is entitled to a new trial.

D. *Failure to Disclose Brady evidence*

Tankleff also maintains that he was prejudiced by the prosecution's failure to turn over potentially exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This duty of disclosure is not limited to evidence of the defendant's innocence, but includes material information that would assist the defense in the impeachment of key witnesses. *See United states v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380-81, 87 L.Ed.2d 481 (1985). The defense's theory at trial was that Jerry Steuerman, Seymour Tankleff's former business partner, had killed the Tankleffs and that the police had focused so quickly on Martin Tankleff that they never really investigated Steuerman. After trial, defense counsel discovered that the prosecution was aware of, but had failed to disclose, evidence that twelve years earlier, Steuerman had hired Hell's Angels to attack union protesters outside his bagel store. The defense contends that this evidence could have been used for a devastating cross-examination of Steuerman, who when asked if he had anything to do with the murders testified that he would "never do anything like that." Arguably, hiring Hell's Angels to settle a union dispute is akin to murdering your business partner. (In addition, the defense claims that this information could also have been used in the cross-examination of Detective McCready to show that the police investigation of Steuerman was inadequate.)

The defendant need not show by a preponderance of the evidence that disclosure of the evidence would have resulted in his acquittal. Reversal is warranted if there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would

have been different. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 1565-66, 131 L.Ed.2d 490 (1995). Tankleff has not shown that there is a reasonable probability that this evidence would have changed the outcome of the trial. Steuerman's credibility was already thoroughly undermined on cross-examination by evidence that he had threatened other people with whom he had business relationships. Moreover, Steuerman's bizarre behavior right after the murders also called his innocence into doubt.[4] Similarly, the defense did cross-examine Detective McCready at trial regarding his failure to pursue Steuerman as a suspect.

When a witness's credibility has already been substantially called into question in the same respects by other evidence, additional impeachment evidence will generally be immaterial and will not provide the basis for a Brady claim. *See, e.g., United States v. Zagari*, 111 F.3d 307, 320-21 (2d Cir.) (holding that cumulative impeachment evidence was not likely to have changed the outcome of the trial), *cert. denied*, ____ U.S. ____, ____, 118 S.Ct. 445, 455, 139 L.Ed.2d 381, 390 (1997); *United States v. Wong*, 78 F.3d 73, 79 (2d Cir.1996) (holding impeachment evidence was not material because witnesses' credibility had already been called into question by other evidence); *United States v. Aguillar*, 387 F.2d 625, 626 (2d Cir.1967) ("The discovery of new evidence which merely discredits a government witness and does not directly contradict the government's case ordinarily does not justify the grant of a new trial.").

There is no reasonable probability that the additional piece of evidence not disclosed by the government would have tipped the jury over to Tankleff's side. The

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[4] One week after the attacks, Steuerman withdrew money from the bank account he shared with Seymour Tankleff, faked his own death, and disappeared. He was subsequently found living under an alias in California, having also changed his appearance by shaving his beard.

government's failure to disclose this evidence, standing alone, does not, therefore, warrant reversal.

E. Prosecutor's Remarks During Summation

Tankleff's final claim is that the prosecution's bad faith summation references to Tankleff's half-sister's absence from the defense case violated his due process right to a fair trial. The state's comments, he argues, impermissibly shifted the burden of proof to the defendant.

During closing argument, the prosecutor said, "Where was the defendant's sister and brother-in-law from Port Jefferson, Shari and Ron Rother? . . . Where were these folks who had regular contact with the Tankleffs and with the defendant? . . . Maybe all was not so well in the paradise the defendant would have you believe was his home." Once a defendant comes forward with evidence, the prosecution generally may comment on his failure to call an available witness who is under his control and whose testimony may be immaterial. *See, e.g., United States v. Yuzary*, 55 F.3d 47, 53 (2d Cir. 1995), *cert. denied*, ____ U.S. ____, 118 S.Ct. 178, 139 L.Ed.2d 119 (1997). Tankleff argues that, because the Rothers were cooperating with the prosecution prior to trial, they were not within his control and that it was therefore improper for the prosecution to make this ""missing witness" argument.

The prosecution also commented on Shari's failure to testify regarding Tankleff's phone call to her on the evening after the murders: "You heard the defendant's version of his phone call to his sister at 6:37 in the evening. Yesterday you heard what Detective Rein heard. The two are not even close. Dr. Spiegel had even another version. But we'll get to that. Where's [Shari,] the other party to that conversation?" The defense argues that this argument was made in bad faith because the prosecution knew that Shari

had testified at the suppression hearing that Tankleff had told her that the police "made" him confess-which was consistent with Tankleff's testimony, and not with Detective Rein's.

Relying on jurors' testimony at a post-trial evidentiary hearing, Tankleff further argues that the prosecution's comments had a definite impact on the outcome of the case. During this hearing, a number of jurors acknowledged that the jury had discussed why Shari had not testified, and had even speculated that it was because she thought Tankleff was guilty.

As a threshold matter, we reject the state's argument that Tankleff did not exhaust his state remedies on this issue. Prior to closing arguments at trial, defense counsel asked the trial judge "to make sure that there would be no reference to any witness who's not called by the prosecution." The court rejected this motion, holding that it would not prohibit the prosecution from mentioning missing witnesses. In addition, the defense objected to both of the prosecutor's comments relating to Shari *during* closing argument-even moving for a mistrial-but the court overruled the objections. These issues were also litigated on direct appeal. Indeed, two judges of the Appellate Division would have granted a new trial based on this claim. *See Tankleff*, 606 N.Y.S.2d at 712-13 (O'Brien and Eiber, JJ., dissenting). The New York Court of Appeals also addressed the question, concluding that the statements were not improper and were not made in bad faith. *See Tankleff*, 622 N.Y.S.2d 504, 646 N.E.2d 805. While the defense's explication of this argument may be somewhat more nuanced in the habeas petition, the argument was clearly raised in the state courts and is patently subject to review on habeas.

Our scope of review on habeas is, however, quite limited. In order to grant relief, we would have to find that the prosecutor's comments constituted more than mere trial

error, and were instead so egregious as to violate the defendant's due process rights. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 647-48, 94 S.Ct. 1868, 1873-74, 40 L.Ed.2d 431 (1974); *Floyd v. Meachum*, 907 F.2d 347, 353 (2d Cir. 1990) ("The appropriate standard of review for a claim of prosecutorial misconduct on a writ of habeas corpus is the narrow one of due process, and not the broad exercise of supervisory power.") (internal quotation marks and citations omitted). To be entitled to relief, Tankleff must show "that he suffered actual prejudice because the prosecutor's comments during summation had a substantial and injurious effect or influence in determining the jury's verdict." *Bentley v. Scully*, 41 F.3d 818, 823 (2d Cir.1994) (internal quotation marks and citation omitted).

In deciding whether a defendant has suffered actual prejudice as a result of the prosecutorial misconduct, we have considered "the severity of the misconduct; the measures adopted to cure the misconduct; and the certainty of conviction absent the improper statements." *Floyd*, 907 F.2d at 355 (quoting *United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir.1981) (per curiam)) (internal quotation marks omitted); *accord United States v. Parker*, 903 F.2d 91, 98 (2d Cir.1990). For example, in *United States v. Parker*, we looked to these factors and then upheld the defendant's conviction despite the prosecutor's improper reference to the defendant's failure to call (in a curious parallel to the case before us) his sister as a witness. We noted that the prosecution's conduct did not evidence bad faith, that the trial court's instructions had a substantial curative effect, and that the strong evidence of guilt made it highly probable that the jury would have convicted the defendant regardless of the prosecutor's comments. *See Parker*, 903 F.2d at 99. In *Floyd v. Meachum*, on the other hand, we granted habeas relief to the petitioner, observing that the prosecutorial misconduct was severe, the corrective measures taken by the trial court were inadequate, and it was "by no means clear or

even probable that appellant would have been convicted absent the prosecutor's misconduct." *Floyd*, 907 F.2d at 356 (internal quotation marks and citations omitted).

With respect to the severity of the prosecutorial misconduct, we find that the two statements to which Tankleff objects were clearly improper. The prosecutor's second improper comment is particularly troubling. The prosecutor remarked on Shari's failure to testify regarding Tankleff's phone call to her on the evening after the murders, suggesting that, if Shari had testified regarding the phone call, her testimony would have conflicted with Tankleff's account of the phone call and supported Detective Rein's version. In fact, Shari's testimony under oath at the pretrial suppression hearing-of which the prosecution was fully aware-corroborated Tankleff's description of the phone call.

Relying on *Parker*, the government contends that it was not improper for the prosecutor to disregard Shari's testimony at the suppression hearing in making this argument. In *Parker*, we held that the government did not act in bad faith in refusing to credit the story given by a witness in an unsworn interview with the police. But we emphasized that the *Parker* witness' pretrial statement was unsworn, and noted that the government was not required "to believe that she would have repeated it under oath." 903 F.2d at 99. In contrast, Shari's testimony at the suppression hearing was given under oath, and we have held that the prosecution is not allowed to ignore *sworn* testimony. We have stated, for example, that "[t]he government cannot properly, either explicitly or implicitly, mischaracterize the substance of grand jury testimony," which is given under oath. *United States v. Valentine*, 820 F.2d 565, 570 (2d Cir.1987). And in *Valentine*, we held that it was a due process violation for the prosecutor to suggest that certain witnesses, who had not testified at trial but who had testified before the grand jury, supported the government's theory of

the case, when in fact their testimony before the grand jury did not. We stated that this "violated the due process prohibition against a prosecutor's making 'knowing use of false evidence,' including by misrepresenting the nature of nontestimonial evidence." *Id.* (citation omitted); *cf. United States v. Rosa*, 17 F.3d 1531, 1548-49 (2d Cir.1994) ("It is clear, of course, that it is improper for a prosecutor to mischaracterize the evidence or refer in summation to facts not in evidence."). It is at least arguable that, in the case before us, the prosecution did precisely what we prohibited in *Valentine*; that is, that its mischaracterization went well beyond any "missing witness" problem.

Nevertheless, we are also mindful that the prosecutor's comments were short and fleeting, and thus much less likely to have had a substantial effect on the jury's verdict. *Cf. Bentley*, 41 F.3d at 825 (denying habeas relief where "prosecutor's summation comments were both brief and isolated."). By contrast, the prosecutor in *Floyd* made improper comments 'literally dozens of times throughout her opening and closing summations." 907 F.2d at 348. In granting habeas relief in that case, we noted that it was "one of those rare cases where the improper comments in a prosecutor's summation were so numerous and, in combination, so prejudicial that a new trial is required." *Id.* With respect to the first factor, therefore, we conclude that the severity of the prosecutor's misconduct in Tankleff's case was mitigated by the brevity and fleeting nature of the improper comments.

In addition, the trial judge instructed the jury that the burden of proof always rests with the prosecution and that the attorney's arguments on summation are not evidence and, therefore, that the jury should not base its verdict on them. The defense requested a more specific curative instruction, and it was error for the trial court to refuse to give one. *Cf. Floyd*, 907 F.2d at 355 ("[T]he only arguably curative

measure adopted by the trial judge-the normal instruction in the course of his charge that argument of counsel is not evidence-was inadequate."); *Modica*, 663 F.2d at 1182 ("The court's pattern instruction to the jury-that the arguments of counsel are not to be considered evidence-was proper, but was an insufficient response to the prosecutor's conduct."). However, looking at all the circumstances, we conclude that the standard instructions given by the trial court were probably sufficient to cure any harm that the prosecutor's misstatements may have caused.

Finally, we are not prepared to say that this is a case in which the evidence was so closely balanced that the prosecutor's comments were likely to have had a substantial effect on the jury. *Cf. United States v. Saa*, 859 F.2d 1067, 1077 (2d Cir.1988) ("[B]ased on the other evidence against [the defendants], we find . . . that any adverse inference improperly drawn by the jury would not have tilted the scales from not guilty to guilty."). The fact that the jurors discussed Shari's non-appearance does not convince us otherwise. Her failure to testify in regard to the phone conversation with the defendant-a conversation about which two other parties, including the defendant, had testified-was bound to be a source of some interest to the jurors regardless of the prosecutor's comments. Moreover, the jurors indicated that their discussion of Shari's absence was brief, and that they knew that the state could also have called her as a witness, but failed to do so. Finally, they did not suggest that it in any way influenced their verdict.

Accordingly, we conclude that Tankleff has not met his burden of showing that he was substantially prejudiced by these, admittedly improper, comments.

III. CONCLUSION

We have considered all of Tankleff's claims carefully and, while we find that several of the issues are close and far from free of difficulty, we nevertheless conclude that Tankleff is not entitled to federal habeas relief on any of them except for the *Batson* claim. The judgment below is, therefore, affirmed in part and reversed in part and the case is remanded to the district court for further proceedings consistent with this opinion.

Supreme Court, Appellate Division, Second Department, New York.

The PEOPLE, etc., Respondent,
v.
Martin TANKLEFF, Appellant.

Dec. 27, 1993.

Before BRACKEN, J.P., and SULLIVAN, EIBER, O'BRIEN and PIZZUTO, JJ.

MEMORANDUM BY THE COURT.

Appeals by the defendant from two judgments of the County Court, Suffolk County (Tisch, J.), both rendered October 23, 1990, convicting him of murder in the second degree (two counts; one count as to each indictment), upon jury verdicts, and imposing sentences. The appeals bring up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress his statements to the police.

ORDERED that the judgments are affirmed.

At approximately 6:17 A.M. on the morning of September 17, 1988, two police officers responded to a home in Belle Terre, New York, where they discovered the body of Arlene Tankleff, who had been beaten and stabbed to death, and Seymour Tankleff, who had been severely beaten and stabbed, but who was still breathing. Seymour Tankleff was taken to the hospital, where he later died.

At 9:20 A.M., the defendant arrived at police headquarters. At 9:40 A.M., two detectives started to question the defendant. The defendant initially provided an exculpatory version of events of that morning and had, in

fact, accused another person of the crimes in question. However, at approximately 11:45 A.M., one of these two detectives, James McCready, devised a stratagem in order to test the defendant's veracity. This stratagem took advantage of the fact that the defendant's father Seymour Tankleff had initially survived and had been taken to the hospital.

At 11:45 A.M., Detective McCready staged a telephone call to the hospital and pretended to be party to a nonexistent telephone conversation, during the course of which he said, in a voice loud enough to be overhead, "Yeah, John, yeah. You're kidding? No kidding, he came out. Okay. Thanks a lot." McCready then advised the defendant that Seymour Tankleff had come out of a coma and had accused the defendant of being the assailant. McCready testified, "I told him that his father told Detective Pfalzgraf [stationed at the hospital] that he, Marty, was the one who did this to his father; that he beat and stabbed his father". No Miranda warnings had been given at this point.

The defendant's first response was to attempt to reconcile his prior exculpatory version with his father's putative accusation. He said, "If my father said that, that's because I'm the last person he saw". The second detective, Norman Rein, then stated, "Marty, maybe your father was conscious when you came in and stabbed him". At this point, the defendant volunteered to take a lie detector test, but his request was refused. Detective Rein continued the questioning by asking, "What do you think we should do to the person who did this to your mother and father?" At this point, the defendant responded, "Whoever did this needs psychological help". After this statement, the defendant continued speaking. He asked, "Could I have blacked out and done it?" Detective Rein then asked whether the defendant thought he had blacked out. The defendant responded by stating, "that it wasn't him, but it was like another Marty Tankleff that killed them." Then the

defendant asked, "Could I be possessed?" and Detective Rein responded "Marty, I think that's what happened to you". Finally, at approximately 11:54 A.M., the defendant said, "It's coming to me". At this point, Detective McCready intervened and administered the Miranda warnings. At approximately 11:56 A.M., the defendant made a full confession.

On appeal, the defendant's first argument is that his confession was extracted from him in violation of his privilege against self-incrimination under the Federal and State Constitutions (U.S. Const., 5th, 14th Amends.; N.Y. Const., art. I, § 6). Specifically, he argues that the police subjected him to a custodial interrogation in violation of the rule announced in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. We disagree.

A suspect is not entitled to receive a recitation of his Miranda rights unless he is in police custody. In New York, the question whether a suspect is in police custody is to be determined with reference to the question whether an ordinary person, innocent of any crime, would, in the defendant's position, think that he was free to leave (see, e.g., *People v. Yukl*, 25 N.Y.2d 585, 307 N.Y.S.2d 857, 256 N.E.2d 172; *see also*, *People v. Centano*, 76 N.Y.2d 837, 560 N.Y.S.2d 121, 559 N.E.2d 1280; *People v. Hicks*, 68 N.Y.2d 234, 508 N.Y.S.2d 163, 500 N.E.2d 861; *Matter of Kwok T.*, 43 N.Y.2d 213, 401 N.Y.S.2d 52, 371 N.E.2d 814; *People v. Rodney P.*, 21 N.Y.2d 1, 286 N.Y.S.2d 225, 233 N.E.2d 255). Applying this standard, the County Court found that the defendant was not in custody until after he had made the ambiguous statements noted above and until after he had been advised of his Miranda rights. We agree with this finding.

The defendant was clearly not in custody when he arrived at police headquarters at 9:20 A.M. Even assuming

that the police suspected the defendant at this point, neither the defendant himself nor a reasonable person, innocent of any crime, would have known of these suspicions. The defendant accused a third party of committing the murders, and he most likely would have believed that his presence at the police station was required, not because he was a suspect, but because he was a crucial witness. That Detective McCready later used a ruse to cause the defendant to believe that there was inculpatory evidence against him (his father's purported hospital bed statement) "ha[d] nothing to do with whether the [defendant] was in custody for the purposes of the Miranda rule" (*Oregon v. Mathiason*, 429 U.S. 492, 496, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 [custody status unaffected by police officer's deceptively telling defendant of inculpatory evidence]; see also, *Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243). Therefore, we find that the defendant's having made the cryptic statements noted above without having had the benefit of Miranda admonitions does not require suppression of the subsequent confession.

The defendant also contends that his confession should have been suppressed because it was the product of a police-orchestrated ruse. We agree that the weight of the evidence establishes that it was Detective McCready's spurious telephone call to the hospital, followed by his deceptive report to the defendant as to the supposed content of the bogus telephone call, which in fact prompted the defendant to confess. However, it is also clear to us that the type of trickery employed by Detective McCready in this case was not likely to provoke an unreliable confession; on the contrary, we find that the factual reliability of the defendant's confession was, if anything, enhanced by the nature of the particular ploy which was used to elicit it. Needless to say, we give no credence to the defendant's claim that he confessed because he was "brainwashed". The stratagem employed by the police in this case was, in short,

not so fundamentally unfair as to have deprived the defendant of his due process rights (*see, People v. Tarsia*, 50 N.Y.2d 1, 427 N.Y.S.2d 944, 405 N.E.2d 188; *People v. Brewley*, 192 A.D.2d 540, 596 N.Y.S.2d 91; *People v. Hassell*, 180 A.D.2d 819, 580 N.Y.S.2d 773; *People v. Collins*, 156 A.D.2d 703, 549 N.Y.S.2d 459; *People v. Sohn*, 148 A.D.2d 553, 539 N.Y.S.2d 29).

The defendant also argues that there was insufficient evidence to support the jury's verdict finding him guilty of "depraved mind" murder with respect to the death of his mother Arlene Tankleff, and that this verdict is inconsistent with the one finding him guilty of intentional murder with respect to the death of his father Seymour Tankleff. These related arguments are meritless.

While it is true that a person cannot commit a single homicidal act while entertaining two inconsistent mental states (see, *People v. Gallagher*, 69 N.Y.2d 525, 516 N.Y.S.2d 174, 508 N.E.2d 909 [defendant cannot simultaneously both have the conscious intent to kill and lack the conscious intent to kill]) the obvious fact in the present case is that the defendant engaged in two separate acts and two separate courses of conduct, that is, the killing of his mother and the killing of his father. Clearly, it was possible for him to have had two different mental states at these two different times.

We agree with the defendant to the extent that he argues that the evidence presented by the prosecution is far more consistent with the conclusion that he intended to kill his mother than with the jury's conclusion that he killed her recklessly. However, we are not free to vacate a conviction based on a finding of recklessness merely because we ourselves consider that a finding of intent would have been more plausible in light of the evidence. The present case is certainly not the first one in which such a circumstance has

arisen (*see*, e.g., *People v. Applegate*, 176 A.D.2d 888, 576 N.Y.S.2d 583; *People v. Abney*, 173 A.D.2d 545, 570 N.Y.S.2d 303; *People v. Santana*, 163 A.D.2d 495, 558 N.Y.S.2d 172, *affd*, 78 N.Y.2d 1027, 576 N.Y.S.2d 208, 582 N.E.2d 591; *People v. Curry*, 158 A.D.2d 466, 551 N.Y.S.2d 58 [cases where evidence would have supported finding of intent yet jury opted for finding of recklessness]). The jury's conclusion that the defendant lacked a conscious objective to kill while he was beating his mother to death is not irrational, and should be upheld (*cf.*, *People v. Gonzalez*, 160 A.D.2d 502, 554 N.Y.S.2d 506).

We have examined the defendant's remaining contentions and find them to be without merit.

BRACKEN, J.P., and SULLIVAN and PIZZUTO, JJ., concur.

O'BRIEN, Justice, dissents and votes to reverse the judgment, on the law and the facts, to grant that branch of the defendant's omnibus motion which was to suppress his statements to the police, and to dismiss the indictments, with the following memorandum, with which EIBER, J., concurs.

Based upon the totality of the circumstances, and giving particular consideration to the youth of the defendant, I conclude that the defendant was subjected to custodial interrogation without the benefit of the Miranda warnings and, therefore, his confession should be suppressed.

At the time of the murders, the defendant was still a minor and special care should have been taken to ensure that his rights were protected (*see*, *People v. Alaire*, 148 A.D.2d 731, 539 N.Y.S.2d 468; *People v. Ventiquattro*, 138 A.D.2d 925, 527 N.Y.S.2d 137; *People v. Ward*, 95 A.D.2d 351, 466 N.Y.S.2d 686; *see also*, *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527; *Haley v. Ohio*, 332 U.S. 596, 68

S.Ct. 302, 92 L.Ed. 224). Instead, the police improperly isolated the defendant from his family for the purpose of interrogation (*see*, e.g., *People v. Ventiquattro*, 138 A.D.2d 925, 527 N.Y.S.2d 137, *supra*; *People v. Hall*, 125 A.D.2d 698, 509 N.Y.S.2d 881), questioned him in an increasingly accusatory manner for hours without advising him of his Miranda rights, and employed a ruse to extract inculpatory statements. As the questioning progressed over the course of the morning, no reasonable person of 17 years of age, in the defendant's position, and innocent of any crime, would believe that he was free to leave the presence of the police (see, *People v. Yukl*, 25 N.Y.2d 585, 307 N.Y.S.2d 857, 256 N.E.2d 172, *cert. denied* 400 U.S. 851, 91 S.Ct. 78, 27 L.Ed.2d 89; *People v. Alaire*, 148 A.D.2d 731, 539 N.Y.S.2d 468, *supra*; *People v. Hall, supra*). The defendant was continuously under police control from approximately 6:30 A.M., which was shortly after the first police officers arrived at the Tankleff house, until 11:54 A.M., when he was finally given the Miranda warnings.

Within about 15 minutes of the arrival of the police at his home at about 6:17 A.M. on September 17, 1988, the defendant was separated from his brother-in- law, the only relative present, because the police did not want them to "contaminate each other's story". The defendant was told to remain in a police car and was questioned intermittently by various police officers for approximately two hours concerning the discovery of his parents' bodies. While at the Tankleff house, the police would not permit the defendant to wash blood from his hands or to enter the house to obtain a pair of shoes. At 8:35 A.M., the police took the defendant from his house to police headquarters, and there is no dispute that the police considered him a suspect at that point. At police headquarters, the defendant was placed in a small room, where he was questioned by two detectives without interruption for over two hours. He was subjected to increasingly accusatory questioning, as the detectives

inquired as to gaps in his story, such as why there was blood on the light switch in his room, why he did not see his mother the first time he went into her darkened room, and why he did not have more blood on his body. The defendant was asked to demonstrate how he moved his wounded father out of a chair. At one point, the defendant was told that his explanation was "ridiculous". Detective McCready testified that he was aware that the defendant's immediate family members were available at the hospital where Mr. Tankleff was being treated and that, before proceeding to police headquarters with the defendant, Mr. Tankleff's attorney had given him a telephone number where he could be reached. Furthermore, it is apparent from the testimony elicited from the defendant's sister, which the court found credible, that family members were led to believe that the police would bring the defendant to the hospital from his home.

Even assuming, arguendo, that the defendant was not in custody during the initial interrogation at police headquarters, it must be concluded that once Detective McCready falsely advised the teenaged defendant that his father had identified him as the assailant, no reasonable, innocent person who found himself identified as the perpetrator in this manner would have believed that he was free to leave. Consequently, it is clear that by this point, the defendant was in custody. Moreover, even after employing the ruse, the interrogating detectives continued to question the defendant without the benefit of Miranda warnings until he began to break and give inculpatory statements. It was only at this point, after the defendant admitted the possibility that he could have been the individual who killed his parents, that the detectives advised him of his constitutional rights.

Under these circumstances, the issuance of the Miranda warnings to the defendant shortly after the ruse was insufficient to dissipate the taint of the previous improper

police conduct, as the defendant was subjected to continuous custodial questioning (*see*, e.g., *People v. Chapple*, 38 N.Y.2d 112, 378 N.Y.S.2d 682, 341 N.E.2d 243; *People v. Daniels*, 189 A.D.2d 892, 592 N.Y.S.2d 793; *People v. Anderson*, 178 A.D.2d 605, 577 N.Y.S.2d 873). The rule with respect to Miranda warnings is that "[l]ater is too late, unless there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning" (*People v. Chapple*, *supra*, at 115, 378 N.Y.S.2d 682, 341 N.E.2d 243).

A comparison between the facts of this case and the facts in *People v. Hall*, 125 A.D.2d 698, 509 N.Y.S.2d 881, *supra*, in which this court suppressed the defendant's confession, demonstrates that the conduct of the police in this case was more egregious. In *Hall*, the 15-year-old defendant was the only other person at home when his sister was stabbed to death. He was questioned for an hour by three police officers in the house of one of the officers, during which the officers pointed out inconsistencies in his story. Here, as in *Hall*, "as the session wore on, it must have become apparent to the defendant that he had become a suspect and was not free to simply terminate the questioning and leave" (*People v. Hall*, *supra*, at 700, 509 N.Y.S.2d 881). Moreover, in *Hall*, unlike here, the police officers did not use a ruse to extract a confession.

I am mindful that the findings of the hearing court are accorded great deference on appeal (see, *People v. Prochilo*, 41 N.Y.2d 759, 395 N.Y.S.2d 635, 363 N.E.2d 1380), and here the hearing court found that the People's witnesses were credible. Nevertheless, even accepting the truth of the prosecution's proof, I conclude that the record fails to support the hearing court's determination that the defendant was not in custody prior to administration of the *Miranda* warnings. In view of the absence of any other evidence

connecting the defendant to the murders, except for the confession which he disavowed at the trial, the indictments should be dismissed.

Finally, even if I agreed with my colleagues that the confession should not be suppressed, I would dissent and vote to grant the defendant a new trial based on the court's error in permitting the prosecutor to comment during summation on the defendant's failure to call his sister and brother-in-law as witnesses. Generally, once a defendant comes forward with evidence, the prosecution may comment on his failure to call an available witness whose testimony may be material and who is under his control (*see*, *People v. Rodriguez*, 38 N.Y.2d 95, 98, 378 N.Y.S.2d 665, 341 N.E.2d 231; *People v. De Jesus*, 42 N.Y.2d 519, 525, 399 N.Y.S.2d 196, 369 N.E.2d 752). However, here the defense counsel objected to such comments and alerted the court that the defendant's sister and brother-in-law were not under the defendant's control. In fact, they were cooperating with the prosecution prior to the trial. Under the circumstances, the prosecutor's comments were unfair and, in view of the evidence, cannot be considered harmless beyond a reasonable doubt.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the thirtieth day of May two thousand.

MARTIN H. TANKLEFF,

Petitioner-Appellant,

V.

D.A. SENKOWSKI, et al.,

Respondents-Appellees.

Docket No: 99-2130

[Stamp:
Filed
May 30, 2000]

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Martin H. Tankleff.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney